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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1995

FREDERICK E. WATSON,

Petitioner,

vs.

ANTHONY J. TREPEL; DANIEL E. LUNGREN, in his representative capacity as Attorney General of the State of California; and ORRICK, HERRINGTON & SUTCLIFFE, a law partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FREDERICK E. WATSON
234 Van Ness Avenue
Second Floor
San Francisco, CA 94102
(415) 626-4140

Petitioner in Pro Se

FREDERICK E. WATSON
234 Van Ness Avenue
Second Floor
San Francisco, CA 94102
(415) 626-4140

Counsel of Record

9 PP

QUESTIONS PRESENTED

Willy v. Coastal Corp., 503 U.S. 131; 117 L.Ed.2d 280 (1992) holds that the Federal Rules of Civil Procedure, including Rule 11, confer no subject matter jurisdiction upon the district courts, and that "A final determination of lack of subject matter jurisdiction of a case in a federal Court...precludes further adjudication of it."

The questions presented are:

1. Under this rule announced in *Willy*, when a District Court grants both Rule 12(b)(1) and 12(b)(6) motions and dismisses the action for lack of subject matter jurisdiction and on the merits; and subsequently imposes Rule 11 sanctions, are those sanctions void for lack of subject matter jurisdiction?

2. In such case, when the Court of Appeals affirms the District Court's lack of subject matter jurisdiction, does this establish lack of appellate review jurisdiction and thus make void the Court of Appeals' affirmance of the dismissal on the merits and the Rule 11 sanctions; and also make void its imposition of Rule 38 sanctions for what it rules to be a frivolous appeal?

3. In a subsequent independent action in equity (the *Trepel* action), challenging the sanctions awarded in the earlier *Kruse* action as being void, did the District Court err in dismissing that action, on the ground that the Court of Appeals' prior decision in *Kruse* established as law of the case, that the sanctions were valid and not void?

4. On appeal from the District Court's dismissal of the *Trepel* independent action, did the Court of Appeals err in affirming that dismissal, on the basis of construing *Willy* to announce a rule under which the *Kruse* sanctions were not void, despite the lack of subject matter jurisdiction?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

Petitioner Frederick E. Watson prays that a writ of certiorari issue to review the judgment and Memorandum Decision of the United States Court of Appeals For The Ninth Circuit, filed on June 9, 1995, petition for rehearing of which was denied by the Court of Appeals on July 12, 1995.

OPINIONS BELOW

As noted in the Questions Presented, this Petition requests review of the Court of Appeals' June 9, 1995 decision in the *Trepel* action, which was filed as an independent action in equity, and a direct attack upon Rule 11 sanctions imposed in the prior *Kruse* action, as being void for lack of subject matter jurisdiction. Thus, the pertinent orders, judgments and opinions are those rendered by the District Court and the Court of Appeals in the *Kruse* action, and the subsequent *Trepel* action. Accordingly, the opinions below, in chronological order, are as follows:

The unpublished memorandum opinion orders of the District Court in *Kruse*, which were filed on August 21, 1989, June 18, 1990 and August 22, 1990, appear in Appendices A, B, and C, respectively. The unpublished Memorandum decision of the Court of Appeals in *Kruse*, which was filed October 24, 1991, and which adopted the opinions and orders of the District Court, appears in Appendix D. The subsequent orders of the Court of Appeals in *Kruse* imposing appellate sanctions, which were filed December 12, 1991, March 5, 1992, and August 21, 1992, appear in Appendices E, F, and G, respectively.

The unpublished memorandum opinion orders of the District Court in *Trepel*, which were filed on June 14, 1994 and August 5, 1994, appear as Appendices H and I, respectively. The unpublished Memorandum decision of the Court of Appeals in *Trepel*, filed June 9, 1995 and the Order

Denying Rehearing, filed July 12, 1995, appear as Appendices J and K, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 9, 1995, and timely petition for rehearing was denied on July 12, 1995. This petition for certiorari is filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. Introduction

As appears from the Questions Presented, petitioner attorney seeks to have this Court grant review to settle important questions of first impression in this Court, arising from application to the present case, of the rule announced by this Court in *Willy v. Coastal Corp.*, 503 U.S. 131; 117 L.Ed.2d 280 (1992). Petitioner respectfully submits that application of that rule to the present case will establish that sanctions imposed upon him in a prior federal district court action were void for lack of subject matter jurisdiction to impose same.

However, petitioner is aware that if this Court believes, after review of this petition, that grant of review and holding the sanctions to be void, will allow an abuse of the judicial process to go unpunished, and there to be no deterrence of abuse of the judicial process; then this Court may feel that the orderly administration of justice is better served by simply declining to grant review in this case.

For that reason, petitioner will set forth hereinafter in this Statement Of The Case, the facts and reasons showing why grant of review and holding of the sanctions to be void under the rule announced in *Willy*, will not result in any abuse of the judicial process going unpunished, because there was no abuse of the judicial process, since the sanctions were imposed

after dismissal of that action for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine.[1/]

In addition, grant of review and establishment of voidness of the *Kruse* sanctions will not result in any renewal, in state court, of Mrs. Kruse's litigation against state appellate Justices, or the state courts named as defendants in the prior action, and against whom prospective injunctive relief was sought. This is so, because prospective injunctive relief is no longer available due to decisions of the California courts mandating the entry of judgment in favor of the bank and against Mrs. Kruse. Therefore, even if petitioner were willing to undertake representation of his former client, there would be no action that she could file seeking prospective injunctive relief. Moreover, petitioner has absolutely no desire or intention to undertake such litigation on behalf of Mrs. Kruse or any other person.

B. Relevant Proceedings In The State Courts

Petitioner, as counsel for Mrs. Irene O'Connell Kruse, recovered a substantial judgment in state court against the defendant Bank of America ("Bank") which was reversed on the Bank's appeal to the State Court of Appeal. Counsel learned after the reversal that two of the Justices on the panel had previously announced in another appeal involving the Bank that they had a financial relationship to the Bank which disqualified them to sit on appeals to which the Bank was a party. Also, the reversal opinion indicated that the procedural methods of appellate review employed, violated federal due process and equal protection rights of Mrs. Kruse.

Therefore, petition was filed in the California Supreme Court for discretionary appellate review of the Court of Appeal decision, on grounds of financial interest and bias of the Justices, and their violation of federal constitutional rights, and that petition was denied.

1/ *Rooker v. Fidelity Trust Co.*, 263 U.S. 413; 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482; 75 L.Ed.2d 206, 222 (1983).

C. Proceedings In The Courts Below

Thereafter, petitioner conducted 10 months prefiling investigation, and assembled evidence from public records, which convinced him that not only had the two Justices violated federal constitutional rights in the appellate review methods employed, but had conspired with the Bank in advance to reverse Mrs. Kruse's judgment.

Petitioner then filed the first and only civil rights action he has ever filed naming the two Justices and the Court of Appeal and seeking prospective injunctive relief in the form of a District Court Injunction against enforcement of the State Appellate Court decision reversing Mrs. Kruse's judgment, and assignment of the Bank's appeal to another panel for a rehearing of the appeal. In support of the conspiracy allegations petitioner filed with the complaint a 371 page appendix of documentary evidence, showing the circumstantial evidence and inferences relied upon.

The defendants moved at the outset of the case to dismiss for lack of subject matter jurisdiction, on the grounds that the *Rooker-Feldman* doctrine applied, because the California Supreme Court had previously entered a decision on the merits, ruling adversely on the same federal constitutional claims pleaded in the federal District Court civil rights action. Defendants argued that the California Supreme Court's order denying discretionary appellate review should be treated as an order denying a petition for writ of mandate addressed to the Supreme Court, which of course it was not. The significance of this mischaracterization of the relief requested of the California Supreme Court was that under the California Constitution, denial of a petition for discretionary appellate review of a Court of Appeal decision can never be a decision on the merits. Only after grant of review can there be a decision on the merits. By contrast, denial by the California Supreme Court of a petition for writ of mandate addressed to that Court, can, under certain circumstances, constitute a decision on the merits.

The *Kruse* District Court accepted the defendants' argument that the denial of the petition for discretionary review should be treated as denial of a petition for writ of mandate (App. 19-20), thus making that denial of review a decision on the merits giving rise to a *Rooker-Feldman* lack of subject matter jurisdiction in the federal District Court and dismissal of the action on that ground. (App. 6-8) However, despite the Court's expressly declared lack of subject matter jurisdiction to rule on the merits, the Court proceeded to grant defendants' motion for dismissal on the merits, *not* because the complaint was facially deficient, which it clearly was not; but rather because the defendants asserted the affirmative defense of res judicata and collateral estoppel, based on the theory that the California Supreme Court's denial of discretionary review was an adverse decision on the merits of the federal constitutional claims asserted in Mrs. Kruse's federal District Court complaint.

The *Rooker-Feldman* doctrine and rule is of course that the lower federal courts have no subject matter jurisdiction to conduct appellate review of state court decisions on the merits of federal questions, and thus cannot rule whether the state court ruling was right or wrong. Accordingly, the *Kruse* District Court had no jurisdiction to rule that the California Supreme Court's adverse ruling on the merits was *right*, and thus apply that ruling as a res judicata bar to the action and dismiss on the merits. As shown in the later argument of reasons for granting the writ, since the *Kruse* District Court had no jurisdiction to determine whether the complaint did or did not state a good claim for relief, it had no jurisdiction to rule that the complaint was so lacking in merit as to be frivolous. There thus was never any valid determination made that the complaint was frivolous; and accordingly, grant of review by this Court, and ruling that the *Kruse* sanctions were void for lack of subject matter jurisdiction, under the rule announced in *Willy*, cannot and will not result in an abuse of judicial process going unpunished, because, for the reasons just-stated, there was no abuse of judicial process.

The State of California paid for the defense of the two Justices in the *Kruse* case by private counsel, but for

reasons known to the State Administrative Officers and unknown to petitioner, they entered into a standard contract with attorney Trepel, who represented Justice Racanelli, which standard contract limited the maximum amount of fees and costs that could be paid, but did not enter into a standard contract with the Orrick law firm which represented Justice Newsom. The result was that attorney Trepel was paid $26,000 for fees and costs for filing motions to dismiss and motions for sanctions (App. 34) and the Orrick firm was paid $224,000 for fees and costs for filing the same two motions and applied for that amount in sanctions, but upon objection by petitioner the District Court ruled that the Orrick firm had used a staff of 22 lawyers, paralegals, law clerks, etc., to run up such an extremely large bill, and therefore reduced by $58,000 the amount of sanctions awarded (App. 34-35). Likewise, on appeal, the Attorney General's office, which represented the Court of Appeal, was awarded $7,200 in sanctions as attorneys fees on appeal (App. 60), whereas the Orrick firm was paid $71,000 as sanctions for attorneys fees for filing a brief on appeal.

After the *Kruse* District Court's dismissal of the action for lack of jurisdiction and on the merits (App. 17-20), appeal was taken to the Ninth Circuit. Petitioner's appeal was taken on the grounds that the California Supreme Court, by its denial of discretionary appellate review, did not render a decision on the merits, and the *Rooker-Feldman* doctrine therefore did not apply, and the *Kruse* action should have proceeded to trial on the merits. Petitioner was therefore not thinking in terms of arguing on appeal that the dismissal on the merits and imposition of sanctions were void because of application of the *Rooker-Feldman* doctrine. Moreover, while petitioner in 1990 had been in practice 37 years, and had been an Assistant United States Attorney in San Francisco prosecuting criminal cases 1958-1959, he had not tried but one civil case in federal court, and was not familiar with the rule that lack of subject matter jurisdiction would render void a decision on the merits, and would deprive the appellate court of appellate subject matter jurisdiction. For these reasons, petitioner did not raise any issue on the *Kruse* appeal of voidness of the decision on the merits or the sanctions.

The Ninth Circuit affirmed the judgment and the imposition of sanctions for the reasons stated by the District Judge in her memorandum and orders below, and imposed Rule 38 appellate sanctions for a frivolous appeal (App. 40).

By its affirmance of the District Court's express finding and declaration that it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine, the law of the case was established that the District Court had lacked subject matter jurisdiction from the time it so expressly ruled and declared.

The sanctions judgment creditors did not take action to attempt to enforce or even threaten enforcement and execution upon the sanctions judgment until the spring of 1993, at which time they threatened to levy execution upon the home of petitioner and his wife, and petitioner was forced to file for bankruptcy. By that time, petitioner had become aware of this Court's decision in *Willy*, and therefore, while in bankruptcy, filed in February 1994, the *Trepel* independent action, as a direct attack challenging the *Kruse* Rule 11 sanctions as being void for lack of subject matter jurisdiction, under the rule announced in *Willy*.

The *Trepel* District Court dismissed that action for failure to state a claim for relief, on the grounds that the Ninth Circuit's *Kruse* decision had established as law of the case that the *Kruse* sanctions were valid and not void for lack of subject matter jurisdiction. (App. 49-52) In briefs filed in support of that *Trepel* independent action in both the District Court and the Ninth Circuit on appeal, there were cited the authorities which support the proposition that a simultaneous dismissal of a District Court action on the grounds of lack of subject matter jurisdiction, and on the merits for failure to state a claim for relief is viewed, in law, as being only a dismissal for lack of jurisdiction and a void dismissal on the merits. *Bell v. Hood*, 327 U.S. 678; 90 L.Ed 939 (1946); *Alvarez v. Erickson*, 514 F.2d 156, 160 (9th Cir. 1975); *Segal v. American Telephone and Telegraph Co., Inc.*, 606 F.2d 842, 844 (9th Cir. 1979); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1271, 1279 (7th Cir. 1983).

The Ninth Circuit affirmed, both on the ground of law of the case and the ground of construing this Court's decision in *Willy* to announce a rule under which the *Kruse* Rule 11 sanctions were valid not void, despite the lack of subject matter jurisdiction. (App. 56 57) On July 12, 1995 the Ninth Circuit filed its order denying Petition For Rehearing. (App. 58)

REASONS FOR GRANTING THE WRIT

I. Introduction And Summary Of Argument

The reasons for granting the writ will be more fully discussed hereinafter, but since the issues raised are somewhat complex, it may be of assistance to the Court to first consider the following summary of the arguments:

First, the Ninth Circuit's *Trepel* decision is in direct conflict with this Court's decision in *Willy v. Coastal Corp.*, *supra*, which holds that a district court's final determination of its lack of subject matter jurisdiction, precludes it from further adjudication of the case; and thus makes any subsequent adjudication on the merits and imposing of Rule 11 sanctions, void for lack of subject matter jurisdiction.

By contrast, the Ninth Circuit's *Trepel* decision is based upon construing *Willy* to hold the exact opposite; namely, that even after a district court makes a final determination of lack of subject matter jurisdiction, it can still thereafter validly adjudicate and impose Rule 11 sanctions.

Second, petitioner respectfully submits that review should be granted to reconcile and remove an apparent inconsistency in this Court's holding and decision in *Willy v. Coastal Corp.*, to thereby clarify and settle the question of exactly when and under what circumstances a district court's lack of subject matter jurisdiction precludes and makes void its imposition of Rule 11 sanctions.

In this connection, it is fundamentally important to note at the outset, that petitioner's contention is that imposition of Rule 11 sanctions is void, *only* in the one situation where the district court makes an *express* finding and declaration that it *lacks* subject matter jurisdiction, and *thereafter* imposes Rule 11 sanctions. This is why the present case raises a question of first impression for this Court, since neither in *Willy* nor in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384; 110 L.Ed.2d 359 (1992), did the district court expressly find and declare that it *lacked* subject matter jurisdiction and *thereafter* impose Rule 11 sanctions.

Petitioner submits that this apparent inconsistency in the *Willy* holding has already caused the Ninth Circuit to render an erroneous decision in the *Trepel* case, and has also created among other lower courts, misapprehension, or at least uncertainty, as to what is the actual holding in *Willy* that should be followed.

The apparent internal inconsistency in the *Willy* opinion is as follows:

This Court holds in *Willy* that the Federal Rules of Civil Procedure, including Rule 11, confer no Article III subject matter jurisdiction upon the district courts and thus Rule 11 can constitutionally be applied and enforced only to *implement* and *aid in the exercise of*, the district court's subject matter jurisdiction (including of course, its exercise of its jurisdiction to determine whether it has subject matter jurisdiction).

Therefore, this Court holds in *Willy* that once a federal district court makes a final determination that it lacks subject matter jurisdiction, it is precluded from making any further adjudication of the case; meaning, petitioner submits, that the district court cannot thereafter adjudicate the merits, and therefore cannot constitutionally apply or enforce Rule 11 to *implement* or *aid in exercise of* subject matter jurisdiction which does not exist and thus cannot be implemented or exercised.

However, another portion of this Court's *Willy* opinion can be read to be inconsistent with the above-referred to holding. This is so, because included in the *Willy* opinion is a quotation from the Court's earlier decision in *Cooter & Gell, supra*, where this Court stated that an imposition of Rule 11 sanctions is not a judgment on the merits of an action, but rather is a determination of the collateral issue of whether an attorney has abused the judicial process, and, if so, what sanction would be appropriate.

This language can be read to mean the following:

Subject matter jurisdiction is only required to rule on the merits; imposition of Rule 11 sanctions is not a decision on the merits; and therefore, subject matter jurisdiction is not required in order to impose Rule 11 sanctions.

However, this logic and syllogism is flawed. While it is true that subject matter jurisdiction is only required in order to rule on the merits, and imposition of sanctions is not a ruling on the merits; nevertheless, as this Court holds in *Willy*, application and enforcement of Rule 11 is dependent upon the existence of subject matter jurisdiction. Therefore, as will be shown, once the district court determines and expressly declares that it lacks subject matter jurisdiction, any subsequent imposition of Rule 11 sanctions, is unconstitutional and void, because, in such a case, Rule 11 is not being applied to implement or aid in the exercise of subject matter jurisdiction, or the exercise of jurisdiction to determine jurisdiction.

Petitioner submits that granting review to clarify and settle the law in this manner, need not and will not call into question the correctness of this Court's decision in *Cooter & Gell*; because under the rule announced in *Costello v. United States*, 365 U.S. 265; 5 L.Ed.2d 551 (1961) a district court which has subject matter jurisdiction, is not divested of that jurisdiction merely because an act or omission of a party (such as a voluntary dismissal) *prevents* the Court from thereafter *exercising* its subject matter jurisdiction *to rule on the merits*.

Thus, as will be shown, applying that rule to *Cooter & Gell*, the decision in that case is not inconsistent with the rulings this Court is requested to make in the present case.

Third, for reasons to be later discussed, review should further be granted to settle the question of whether the Ninth Circuit's affirmance of the *Kruse* District Court's lack of subject matter jurisdiction, established such lack of appellate jurisdiction as to make void the Ninth Circuit's affirmance of the dismissal on the merits and its affirmance of the imposition of Rule 11 sanctions; and to likewise make void the Ninth Circuit's imposition of appellate sanctions under Rule 38 and/or 28 U.S.C. §1912.

Fourth, as will be shown, review should be granted for the additional reason that the Ninth Circuit's *Trepel* decision is not only erroneous, but will, if allowed to stand, result in a gross miscarriage of justice and complete financial ruin of petitioner and his wife.

II. Review Is Needed To Settle And Resolve Misapprehension Or Uncertainty Among The Lower Courts, As To When Lack Of Subject Matter Jurisdiction Makes Rule 11 Sanctions Void

A. Such Misapprehension And Uncertainty Does Exist Among The Lower Federal Courts

Petitioner submits that the Ninth Circuit misapprehended this Court's holding in *Willy*, when it held in its *Trepel* decision:

> "Watson's argument that the district court in *Kruse* did not have jurisdiction to impose Rule 11 sanctions, is legally frivolous. See *Willy v. Coastal Corp.*, 503 U.S. 131, 137-139 (1992); *Pacific & Low Ball Cable Television Co. v. Pacific Union Co.*, 987 F.2d 594-596 (9th Cir. 1993)"

The just-quoted citations are to the quotation from *Cooter & Gell*, which is included in the *Willy* opinion, i.e. that

a sanction order is collateral to the merits, thus implying that lack of subject matter jurisdiction has no bearing upon the validity or voidness of Rule 11 sanctions, even in a case such as the present.

In *Keene Corp. v. Kass*, 908 F.2d 293 (8th Cir. 1990) the Eighth Circuit held that the District Court had properly dismissed a §1983 civil rights action, on the ground that it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine, but that the District Court had improperly awarded attorneys fees under 42 U.S.C. §1988, for filing a frivolous complaint.

The Eighth Circuit reversed the award of attorneys fees on the ground that the lack of subject matter jurisdiction precluded award of attorneys fees for filing a frivolous complaint. However, the *Keene* Court took care to state that:

> "We express no view on the propriety of awarding attorneys fees under Rule 11 of the Federal Rules of Civil Procedure in instances where the lawsuit must be dismissed for lack of subject matter jurisdiction." (908 F.2d at 298, n. 6)

The *Keene* decision was of course handed down prior to this Court's decision in *Willy*; however, *Keene* was decided a month after *Cooter & Gell* was handed down.

In *W.G. v. Senatori*, 18 F.3d 60 (2d Cir. 1994), W.G. sued under the Individuals With Disabilities Education Act ("IDEA"), and the action was dismissed for lack of subject matter jurisdiction, but settled favorably to plaintiff, while plaintiff's appeal was pending.

Plaintiff then sought award of attorneys fees pursuant to the fee-shifting provisions of the IDEA statute, which were denied, and the Second Circuit affirmed the denial, on the ground that the fee-shifting provisions of the statute conferred no subject matter jurisdiction, and the lack of subject matter jurisdiction over the substantive provisions of the statute, precluded award of attorneys fees (18 F.3d at 64-65)

However, the Second Circuit noted that there were statutory exceptions to the common law rule that lack of subject matter jurisdiction bars any further adjudication of the case, and that one of those exceptions is:

> "...Fed.R. Civ. P. 11 (sanctions authorized upon finding of abuse of judicial process, even if it is determined that the Court lacks jurisdiction to proceed to the merits of the action). See *Willy v. Coastal Corp.*, ____ U.S.____; 112 S.Ct. 1076, 1079-81 & n. 2..."

B. Review Should Be Granted To Clarify And Confirm (1) The Rule That Rule 11 Sanctions Are Void Unless Imposed In Aid Of Exercise Of Either Subject Matter Jurisdiction, Or Jurisdiction To Determine Jurisdiction; And (2) The Application Of That Rule To The Kruse Case

The first step in this Court's analysis in *Willy* was to note that neither the Rules Enabling Act nor the Federal Rules of Civil Procedure ("Rules") confer any subject matter jurisdiction upon the district courts, to apply or enforce the Rules. (503 U.S. at 134-135) Thus, the Rules may constitutionally be applied and enforced only to govern the *procedural manner* in which the district courts exercise the subject matter jurisdiction conferred upon them (Id. at 134); because the federal courts, in adopting such procedural rules, are not free to extend or enlarge the Art. III subject matter jurisdiction conferred upon the courts (Id. at 135) and therefore the Rules can constitutionally be applied and enforced:

> "...only if their application will not impermissibly expand the judicial authority conferred by Article III."(Id. at 135)

This Court cites its earlier decision in *Hanna v. Plumer*, 380 U.S. 460, 473; 14 L.Ed. 2d 8, 18 (1965) for the proposition that the Rules are "housekeeping rules for federal

courts". (Id at 136) *Hanna* in turn cites (380 U.S. at 464) *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438; 90 L.Ed. 185 (1946) where the Court holds the Rules serve "only to *implement the jurisdiction over the subject matter* which Congress has conferred..." (326 U.S.at 445, emphasis added)

The second step in this Court's analysis in *Willy*, was to note that the Rules cannot constitutionally be applied and enforced by a district court to govern the procedural manner of exercise of subject matter jurisdiction which the court does not have and thus cannot exercise. This is confirmed by the Court's statement that in both the Rules Enabling Act and the Rules themselves, there is the:

> "...implicit premise...that rules of practice and procedure are not necessary for disputes beyond the judicial power conferred by Article III."(503 U.S. at 134)

The third step in this Court's analysis in *Willy* was to cite and discuss (503 U.S. at 137-138) its earlier decisions in *Stoll v. Gottlieb*, 305 U.S. 165; 83 L.Ed. 104 (1938); *United States v. United Mine Workers*, 330 U.S. 258; 91 L.Ed. 884 (1947); and *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72; 101 L.Ed.2d 69 (1988). In those cases the Court held that a grant of subject matter jurisdiction carries with it an implied grant of jurisdiction to determine whether there is subject matter jurisdiction (*Stoll*, 305 U.S. at 171); that when the court is exercising its jurisdiction to determine jurisdiction it may issue orders and apply procedural Rules in aid of its exercise of such jurisdiction (*Mine Workers*, 330 U.S. at 290-291); and thus orders applying and enforcing Rules in aid of exercise of either subject matter jurisdiction or jurisdiction to determine jurisdiction, are valid and constitutional, but otherwise are void (*Catholic Conference*, 487 U.S. at 76;101 L.Ed.2d at 76-77). To illustrate, in *Catholic Conference* the Court holds that Rule 45 grants a district court the power to issue subpoenas, but:

> "...the subpoena power of a court cannot be more extensive than its jurisdiction. It follows that if a

> district court does not have subject matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is *void*..." (487 U.S. at 76; 101 L.Ed.2d at 76-77, emphasis added)

In *Willy*, Rule 11 was not applied and enforced in aid of exercise of jurisdiction to determine jurisdiction, because exercise of that jurisdiction ended with the District Court's mistaken ruling that it had subject matter jurisdiction to rule on the merits of the substantive claims asserted. Instead, Rule 11 was thereafter applied and enforced in aid of exercise of subject matter jurisdiction mistakenly believed to exist. Therefore, the *first* determination of *lack* of subject matter jurisdiction was made on appeal, and it was in this factual context, that this Court announced the rule that:

> "A final determination of *lack* of subject matter jurisdiction of a case in a federal court, of course, *precludes further adjudication of it*. But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction." (Id. at. 137, emphasis added)

Petitioner submits that the meaning of the just-quoted language is that if the final determination of *lack* of subject matter jurisdiction had been made by the District Court in *Willy*, that would have precluded any further adjudication of the merits of the case by the District Court, which in turn would have meant that Rule 11 could not be applied and enforced in aid of exercise of subject matter jurisdiction which did not exist, and this would have made unconstitutional and void, the District Court's subsequent imposition of Rule 11 sanctions.

However, those were not the facts in *Willy*, because the District Court in *Willy* instead ruled that it *had* subject matter jurisdiction, and under the rule announced in *Stoll v. Gottlieb, supra,* (305 U.S. at 170-172) that was a binding res judicata determination of jurisdiction, unless and

until that finding of jurisdiction was reversed on appeal. Accordingly, the District Court's imposition of Rule 11 sanctions in *Willy*, occurred during the time that the District Court's binding ruling that it had subject matter jurisdiction, was in full force and legal effect.

Therefore, for the policy reasons stated by this Court in its opinion (503 U.S. at 136-139), this Court held in *Willy* that up until the time the Fifth Circuit ruled that the District Court lacked subject matter jurisdiction, there was:

> "...no constitutional infirmity under article III in requiring those practicing before the courts to conduct themselves in compliance with the applicable procedural rules in the interim, and to allow the courts to impose Rule 11 sanctions in the event of their failure to do so." (503 U.S. at 139)

1. Application Of The *Willy* Rule To The *Kruse* Case

In *Kruse*, the District Court dismissed the action at the very outset of the case, on the expressly stated ground of lack of subject matter jurisdiction, and under the rule stated in *Stoll v. Gottlieb, supra*, that was a final and binding res judicata determination on subject matter jurisdiction, unless and until reversed on appeal, which it never was, because the Ninth Circuit affirmed the *Kruse* District Court's lack of subject matter jurisdiction.[2/]

Accordingly, under the rule announced by this Court in *Willy*, the District Court's final determination of lack of subject matter jurisdiction in *Kruse*, precluded any further adjudication of the merits of the case by the District Court. Thus, its subsequent imposition of Rule 11 sanctions was not

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[2/] A determination of *lack* of subject matter jurisdiction is just as final and binding as a determination that the court has such jurisdiction. *Dozier v. Ford Motor Co.*, 702 F.2d. 1189, 1195 (D.C. Cir. 1983); *Shaw v. Merritt Chapman & Scott*, 554 F.2d 786, 789-740 (6th Cir. 1977).

in aid of exercise of jurisdiction to determine jurisdiction, because that jurisdiction had been exercised and exhausted by the District Court's determination that it lacked subject matter jurisdiction. Likewise, that imposition of sanctions was not an application of Rule 11 in aid of exercise of subject matter jurisdiction, because the District Court had found and expressly stated that it did not have subject matter jurisdiction. Since Rule 11 was not applied in aid of exercise of jurisdiction to determine jurisdiction, or in aid of exercise of subject matter jurisdiction, the sanctions orders made by the District Court in *Kruse*, were unconstitutional and void, under the rule announced by this Court in *Willy*.

In this connection, the distinction to be noted is that while the *Kruse* district court had statutory subject matter jurisdiction under 42 U.S.C. §1983 and 28 U.S.C. §1343, to entertain federal civil rights actions; the *Kruse* District Court nevertheless lacked *subject matter jurisdiction* under the *Rooker-Feldman* doctrine, to conduct appellate review of a state court's previous decision on the merits of the same federal constitutional claims pleaded in the *Kruse* action. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482; 75 L.Ed.2d 206, 222 (1983).

A further distinction to be noted is that the Rule 11 sanction order in *Kruse* was not "collateral to the merits" for the following reasons: The Rule 12(b)(6) dismissal on the merits of the complaint in Kruse was *not* based on a finding that the complaint was facially deficient. Rather, as shown previously in the Statement Of The Case, the dismissal on the merits was based on applying the *Rooker-Feldman* doctrine to deprive the District Court of subject matter jurisdiction.

Accordingly, this raises the constitutional issue of how the *Kruse* District Court could expressly declare its lack of subject matter jurisdiction to rule on the merits but despite this then make a void dismissal on the merits, and use that void dismissal as the predicate for imposition of sanctions. Since the Court had no jurisdiction to determine that the complaint lacked merit, it obviously had no jurisdiction to determine that the complaint was so lacking in merit as to be frivolous.

C. Review Should Be Granted To Clarify And Confirm That *Cooter & Gell* And Other Cases Do Not Announce Any Rule Contrary To The Rule Announced In The *Willy* Decision Of This Court

In the Fifth Circuit's decision in *Willy* the Court cited and relied upon *Cooter & Gell, supra*, and *Orange Production Credit v. Frontline Ventures, Ltd.*, 792 F.2d 797 (9th Cir.1986) and *Trohimovich v. C.I.R.*, 776 F.2d 873 (9th Cir. 1985), as standing for the proposition that Rule 11 sanctions can be imposed independently of whether the district court has subject matter jurisdiction.

Petitioner submits that none of the three cases stand for that proposition, as shown by the following analysis:

As pointed out in *Costello v. United States*, 365 U.S. 265; 5 L.Ed.2d 551 (1961), a complete *lack* of subject matter jurisdiction must be distinguished from the situation in which the district court *has* subject matter jurisdiction, but is prevented from *exercising* that subject matter jurisdiction to *rule on the merits, by an act or omission of the party*. The Court first refers to "the fundamental jurisdictional defects which render a judgment *void*...such as *lack* of *jurisdiction* over the person or *subject matter*" (365 U.S. at 285; 5 L.Ed.2d at 564, emphasis added) and then contrasts this to the situation where the district court *has* subject matter jurisdiction, but cannot exercise it to rule on the merits because of:

> "...a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim. Failure to file the affidavit of good cause in a denaturalization proceeding falls within this category." (Ibid)

Petitioner submits that under the rule announced in *Costello*, the proper analysis to be made in *Cooter & Gell*, is that the plaintiff's filing of a voluntary dismissal without prejudice under Rule 41(a), prevented the District Court from

thereafter *exercising* its subject matter jurisdiction *to rule on the merits*; but did not prevent subsequent exercise of its subject matter jurisdiction to impose Rule 11 sanctions.

The fact that the *Cooter & Gell* District Court had subject matter jurisdiction, is confirmed by the following portion of this Court's opinion in *Cooter & Gell*:

> "The District Court's jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the merits of the action and the motion for Rule 11 sanctions arising from that filing." (496 U.S. at 395; 110 L.Ed. 2d at 375)

The "jurisdiction" just referred to is necessarily subject matter jurisdiction, since only subject matter jurisdiction could empower the District Court to consider and decide both the merits and a sanctions motion. Thus, consistent with petitioner's suggested analysis, the filing of the Rule 41(a) dismissal prevented subsequent exercise of subject matter jurisdiction to rule on the merits, but did not prevent subsequent exercise of that subject matter jurisdiction to rule on the issue of sanctions, because the voluntary dismissal:

> "...did not *divest* the District Court of jurisdiction to consider respondent's Rule 11 motion." (496 U.S. at 398; 10 L.Ed. 2d at 377, emphasis added)

The final point to be considered on this suggested theory of decision in *Cooter & Gell*, is that the post-dismissal application and enforcement of Rule 11 can properly be regarded as having been in aid of exercise of subject matter jurisdiction, because the filing of the frivolous complaint occurred at a time when the District Court was exercising its subject matter jurisdiction to entertain the action and could have rendered a decision on the merits and imposed Rule 11 sanctions at that time.

Therefore, the post-dismissal imposition of sanctions can properly be viewed and treated as a nunc pro

tunc application of Rule 11 in aid of exercise of subject matter jurisdiction at a time prior to the dismissal.

Trohimovich v. C.I.R., supra, is another illustration of the Court having subject matter jurisdiction, but being prevented from exercising its subject matter jurisdiction by the act or omission of a party; namely, the failure of an appellant to file a timely notice of appeal. Appellate subject matter jurisdiction is not conferred on a Circuit Court Of Appeals by the act of a party in filing a timely notice of appeal; rather, appellate subject matter jurisdiction is conferred on the Circuit Courts Of Appeals by Article III and an act of Congress, and that appellate subject matter jurisdiction preexists the filing of a timely notice of appeal. Thus, "timely filing of a notice of appeal is a mandatory prerequisite to the *exercise* of appellate jurisdiction." (*United States v. Ward*, 696 F.2d 1315, 1317 (11th Cir.1983), emphasis added). Accord: *Meggett v. Wainwright*, 642 F.2d 95, 96 (5th Cir.1981); *Nelson v. Foti*, 707 F.2d 170, 171 (5th Cir.1983).

Thus, petitioner respectfully submits that in *Trohimovich*, the Ninth Circuit did not lack appellate subject matter jurisdiction, but was merely prevented from exercising that jurisdiction to rule on the merits of the appeal, because of the failure of the appellants to file a timely notice of appeal.

However, unlike *Cooter & Gell*, *Trohimovich* cannot be treated as a nunc pro tunc application of FRAP Rule 38, in aid of exercise of appellate subject matter jurisdiction; because the filing of the late appeal occurred at a time when the Ninth Circuit was already prevented from exercising its appellate subject matter jurisdiction. Thus, the imposition of Rule 38 sanctions may well have been void, since the FRAP Rules, like the FRCP Rules, do not confer any subject matter jurisdiction, and can be applied and enforced only to implement or aid in exercise of appellate subject matter jurisdiction to rule on the merits.

But in any event, *Trohimovich* provides no support for the proposition that Rule 11 sanctions can be validly

imposed by a court which has previously announced its lack of subject matter jurisdiction.

In *Orange Production Credit, supra*, the plaintiff filed suit in District Court in California, and the action was dismissed for lack of subject matter jurisdiction. Subsequently, the same plaintiff filed suit against the same defendants in the District Court of Alaska which dismissed the action for lack of subject matter jurisdiction and imposed Rule 11 sanctions for filing a frivolous complaint.

However, the complaint was not frivolous in its pleading of the *substantive claims*, but rather was frivolous in its pleading of facts showing *federal subject matter jurisdiction*, the facts supporting which must be pleaded and proved. *McNutt v. General Motors Acceptance Corp.*, 298 U.S.178, 182-190; 80 L.Ed. 1135.

On appeal of the sanctions, the Ninth Circuit affirmed, on the ground that the plaintiff violated Rule 11 by filing a complaint it knew completely lacked a factual foundation for subject matter jurisdiction. (792 F.2d at 801) Thus, the case does not stand for the proposition that Rule 11 sanctions can constitutionally be imposed for filing a complaint containing allegedly frivolous *substantive claims* on the merits, even where the District Court has previously dismissed the action for expressly stated lack of subject matter jurisdiction. Rather, *Orange Production* stands for the proposition that Rule 11 sanctions can constitutionally be applied in aid of exercise of the Court's jurisdiction to determine jurisdiction, to impose Rule 11 sanctions for filing a complaint containing a frivolous pleading of federal subject matter jurisdiction. This is of course entirely consistent with the rule announced by this Court in *Willy*.

III. Review Should Be Granted To Settle The Issue Of Whether The *Kruse* District Court's Lack Of Subject Matter Jurisdiction Deprived The Ninth Circuit Of Appellate Jurisdiction To (1) Review And Affirm The Imposition Of Rule 11 Sanctions; And (2) To Impose Rule 38 Sanctions For What Is Ruled To Be A Frivolous Appeal

A. The Ninth Circuit Lacked Appellate Jurisdiction To Affirm The Imposition Of Rule 11 Sanctions

In the leading case of *Mansfield, C.& L.M.R. Co. v. Swan*, 111 U.S. 379; 28 L.Ed.462 (1884), this Court held:

> "...because it did not appear that the Circuit [trial] Court had [subject matter] jurisdiction, *this court, on appeal, had no jurisdiction* except for the purpose of reversing the decree appealed from, on that ground [of lack of jurisdiction in the trial court]." (111 U.S. at 382-383; 28 L.Ed. at 464, bracketed words and emphasis added)

Mansfield has been repeatedly cited and followed: e.g. in *Treinies v. Sunshine Mining Company*, 308 U.S.66, 70; 84 L.Ed. 85, 89 (1940); *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 702; 72 L.Ed.2d 492, 501 (1982); and *Bender v. Williamsport Area School District*, 475 U.S. 534, 546-547; 89 L.Ed.2d 501, 514-515 (1986).

In *United States v. Corrick*, 298 U.S. 435; 80 L.Ed. 1263 (1936), the Court again confirmed the *Mansfield* rule, stating:

> "While the District Court lacked jurisdiction we have jurisdiction on appeal, *not of the merits* but merely for the purpose of correcting the error of the lower court in entertaining the suit." (298 U.S. at 440; 80 L.Ed. at 1268, emphasis added)

It is true of course that when a federal appellate court is presented with an appeal, it has jurisdiction to determine its own jurisdiction, and make its own decision as to whether the District Court had subject matter jurisdiction; and whether any ruling by the District Court on its own subject matter jurisdiction or lack of same, was a correct ruling. *Russell v. United States*, 306 F.2d 402,405 (9th Cir.1962). However, once the appellate court determines that the district court lacked subject matter jurisdiction, this brings into operation the *Mansfield/Corrick* rule, and establishes that the appellate court has no jurisdiction to review or affirm, and rather only has jurisdiction to reverse, the void orders and judgments of the district court.

Applying these rules to the *Kruse* case, the Ninth Circuit Court exercised its jurisdiction to determine jurisdiction, and affirmed the District Court's dismissal for lack of subject matter jurisdiction; and by this holding, established as the law of the case, that the District Court lacked subject matter jurisdiction, and that its dismissal on the merits was therefore void and a nullity. (See: *Gould v. MONY*, 790 F.2d 769, 774-775 (9th Cir. 1986)) This holding also established, as a matter of law, under *Mansfield/Corrick*, that since the District Court lacked subject matter jurisdiction to rule on the merits, this Court lacked subject matter jurisdiction to affirm, and only had jurisdiction to reverse, the District Court's void decision on the merits.

The further question raised is whether the Ninth Circuit's lack of appellate subject matter jurisdiction to review or affirm on the merits, also deprived it of appellate jurisdiction to review or affirm the Rule 11 sanctions, which were void because of the *Kruse* District Court's lack of subject matter jurisdiction, under the rule announced by this Court in *Willy*.

Petitioner submits that the Ninth Circuit had no appellate jurisdiction to review or affirm the said Rule 11 sanctions, and that its affirmance of those void sanctions was a void appellate decision; and grant of review is requested to settle this question of law.

B. The Ninth Circuit Lacked Appellate Jurisdiction To Impose Appellate Sanctions Under FRAP Rule 38 And/Or 28 U.S.C. §1912

The Ninth Circuit imposed appellate sanctions under 28 U.S.C. §1912 which provides that where a judgment is affirmed by a Court of Appeals, that Court in its discretion may adjudge to the prevailing party just damages for delay and single or double costs. However, as shown in previous discussion, since the District Court did not have subject matter jurisdiction, the Ninth Circuit did not have subject matter jurisdiction to review or affirm on the merits, and therefore had no jurisdiction to affirm the void dismissal on the merits by the District Court. Therefore, since the Ninth Circuit's affirmance of the dismissal on the merits was void, the Ninth Circuit had no subject matter jurisdiction to impose sanctions under 28 U.S.C. §1912.

The Ninth Circuit also imposed sanctions under FRAP Rule 38, for taking what it ruled to be a frivolous appeal. However, FRAP Rule 1(b) provides that the Rules shall not extend the jurisdiction of the Court of Appeals as established by law. Therefore, the analysis made by this Court in *Willy* (i.e., that Rule 11 can constitutionally be applied only in aid of exercise of jurisdiction to determine jurisdiction, or exercise of subject matter jurisdiction) applies with equal force to FRAP Rule 38. Thus, since the Ninth Circuit did not apply Rule 38 in aid of exercise of jurisdiction to determine jurisdiction, or in aid of exercise of subject matter jurisdiction (which it did not have) the appellate sanctions awarded in *Kruse* under Rule 38 were unconstitutional and void; and review is requested to settle this question of law.

IV. Review Should Be Granted For The Additional Reason That The Ninth Circuit's *Trepel* Decision Is Not Only Erroneous, But Will, If Allowed To Stand, Result In A Gross Miscarriage Of Justice And Complete Financial Ruin Of Petitioner And His Wife

As shown in the Statement of the Case, by reason of the imposition of over $200,000 in Rule 11 sanctions by the District Court, and the imposition of an additional $84,000 in appellate sanctions by the Ninth Circuit, petitioner was forced into bankruptcy to prevent sale on execution of the home of petitioner and his wife. The Trustee in bankruptcy has now liquidated all properties of petitioner (other than the home of petitioner and his wife) which single family residential rental properties, were to be the retirement fund for petitioner and his wife.

In addition, petitioner practices through his professional law corporation, and the Trustee has instituted an adversary proceeding in the Bankruptcy Court seeking to dissolve that corporation and take over its assets which are the only remaining source of funds for petitioner to continue his law practice, and draw an extremely modest salary for he and his wife to live on.

Still further, a $1.5 million judgment recovered for clients in 1992, in a case in which petitioner was awarded $250,000 attorneys fees unfortunately proved to be completely uncollectible because the corporate defendants were forced into bankruptcy in 1994 and prior secured creditors were the only ones receiving any dividend out of the bankruptcy. Moreover, the last hourly fee case which petitioner had ended in March of 1995, and since that time the only income which petitioner and his wife have had has been $1,500 a month Social Security, which payments began in June of 1995 when petitioner reached the age of 70.

Accordingly, if the Ninth Circuit's *Trepel* decision is permitted to stand, petitioner and his wife are threatened with possible loss of their own home, because of not being able to generate sufficient funds to pay off the first deed of trust on

their home, due to inability to maintain petitioner's own law practice by reason of lack of working capital, and because no one is going to employ a 70 year old attorney as a salaried associate.

Because of this threatened financial ruin of petitioner and his wife they have both been under extreme stress, worry and depression, and have at times spoken of not wishing to go on living if they are going to be forced to lose their home and be destitute with no means of support or even able to buy the necessities of life, and therefore petitioner and his wife at times have spoken of suicide.

CONCLUSION

Petitioner respectfully requests that review be granted on the four questions presented.

Dated: October 10, 1995

Respectfully submitted,

FREDERICK E. WATSON
234 Van Ness Avenue
Second Floor
San Francisco, CA 94102
(415) 626-4140
Counsel of Record

FREDERICK E. WATSON
Petitioner in Pro Se

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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1995

FREDERICK E. WATSON,

Petitioner,

vs.

ANTHONY J. TREPEL; DANIEL E. LUNGREN,
in his representative capacity as
Attorney General of the State of California;
and ORRICK, HERRINGTON & SUTCLIFFE,
a law partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FREDERICK E. WATSON
234 Van Ness Avenue
Second Floor
San Francisco, CA 94102
(415) 626-4140

Petitioner in Pro Se

FREDERICK E. WATSON
234 Van Ness Avenue
Second Floor
San Francisco, CA 94102
(415) 626-4140

Counsel of Record

APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IRENE O'CONNELL KRUSE,	)	
	)	
Plaintiff,	)	No. C-89-1440 MHP
-vs.-	)	
	)	**MEMORANDUM AND ORDER**
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT; JUSTICES WILLIAM A. NEWSOM AND JOHN RACANELLI; THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION; LELAND, PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; and DAVID B. FLINN,	)	[Filed August 21, 1989]
	)	
Defendants.	)	

Plaintiff filed this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging violations of her constitutional rights by defendants acting under color of state law. Plaintiff seeks declaratory and injunctive relief from defendant state courts and justices, and money damages from the private party defendants (the Bank of America and attorneys). The matter is now before the court on motions by all defendants to dismiss the action and for sanctions. Having considered the arguments of the parties, for the reasons stated herein, the court finds that it is wholly without jurisdiction to entertain plaintiff's action. Accordingly, the court grants

defendants' motions to dismiss and dismisses the action without prejudice. The motions for sanctions are taken under submission. In connection with the sanctions motion, plaintiff's counsel is to file a declaration within thirty (30) days of the filing of this order. The declaration shall detail what investigation was undertaken into the factual allegations of the complaint prior to its filing, with particular attention to investigation supporting the allegations in paragraphs 24.2 through 30 and paragraphs 38 through 50. Defendants' counsel shall have two weeks from the filing of the declaration to respond.

BACKGROUND

This action arises out of a lawsuit brought by plaintiff Irene O'Connell Kruse in California state court (the "O'Connell case"), alleging state law claims under a "lender liability" theory against Bank of America. In that action, plaintiff alleged that she was fraudulently induced to transfer a controlling interest in her family's apple-processing business, the James E. O'Connell Company, by the Bank's false representations that it would provide long-term financing to the company. She brought claims against the Bank for fraud, intentional interference with prospective economic advantage and intentional infliction of emotional distress.

On July 19, 1985, after a jury trial, a verdict awarding plaintiff over nine million dollars in compensatory and punitive damages was rendered in the Superior Court for Sonoma County. The trial judge denied the Bank's motion for a new trial on the condition that plaintiff accept a remittitur reducing punitive damages, which she did.

The Bank appealed to the California Court of Appeal. On May 18, 1988, a panel of the Court of Appeal consisting of Justices Newsom, Racanelli and Elkington reversed the judgment for plaintiff. Plaintiff filed for rehearing and requested the disqualification of Justices Newsom and Racanelli on conflict of interest grounds. On June 17, 1988, the Court of Appeal denied rehearing and filed a modified opinion

affirming the reversal. The petition for disqualification of Justices Newsom and Racanelli was denied.

Plaintiff appealed to the California Supreme Court, which denied review on September 1, 1988. In her petition, as in this case, plaintiff claimed that the Court of Appeal had violated her rights to equal protection and due process under the Fourteenth Amendment by failing to render a fair, just and impartial decision. Plaintiff also filed a motion to take evidence and discovery, again alleging bias and conflict of interest on the part of Justices Racanelli and Newsom. In denying the petitions, the California Supreme Court stated that plaintiff had not made a prima facie case of bias, prejudice or denial of constitutional rights. Order Denying Review, Defendants' Appendix, Ex. 16.

Following the state Supreme Court's denial of review, plaintiff petitioned for certiorari at the United States Supreme Court, again alleging bias in the Court of Appeal panel and due process violations. Petition for Certiorari, Def. App. Ex. 21. The Supreme Court denied certiorari on January 19, 1989.

The crux of this case is contained in the first of plaintiff's four claims. She alleges that Justice Newsom, Justice Racanelli, the Bank of America and the Bank's attorneys conspired to deny her equal protection and due process of law in reversing the judgment she won at trial in her state action. Plaintiff claims the conspiracy arose from the Bank's "blackmail" and "bribery" of Justice Newsom. Plaintiff alleges that the Bank blackmailed Justice Newsom by threatening to reveal his alleged financial misconduct and bribed him by making loans Justice Newsom was unworthy to obtain. Plaintiff contends that Justice Newsom "persuaded" Justice Racanelli to participate in the decision reversing the O'Connell case.

Plaintiff's second claim is for "conspiracy coerced by duress" against the Bank and attorney defendants. In this claim, she alleges that even if Justice Newsom participated in the alleged conspiracy only under duress, the Bank and attorneys are nonetheless liable for "joint action with a state

official in the subversion of the judicial process." First Amended Complaint at para. 66.

Plaintiff's third claim is for a deprivation of due process of law. Plaintiff claims due process was violated even if the justices did not conspire and were not unable to be fair, because "nevertheless the facts alleged are such that there was a reasonable appearance of such inability to be fair and impartial, and that this constitutes a denial of due process which invalidates" the Court of Appeals decision. First Amended Complaint at para. 68.

Finally, plaintiff's fourth claim alleges a denial of due process and equal protection even if there was no actual conspiracy or inability to be fair and no reasonable appearance of such inability. She claims the Court of Appeal's "switching theories"[1] and failing to view the evidence in the light most favorable to the plaintiff denied her due process and equal protection.

Although plaintiff laces her complaint with allegations of conspiracy, most of her claims are nothing more than a frontal attack on the state court decisions. As explained below, to the extent her claims are based on conspiracy to violate her civil rights, they are barred by res judicata or collateral estoppel. Furthermore, those based on the Court of Appeal's standard of review are barred for lack of federal jurisdiction.

The array of relief sought by plaintiff is at least impressive in its imaginativeness. Plaintiff seeks compensatory and punitive damages against the Bank and its attorneys for their part in the alleged conspiracy. She further seeks "a declaration that Justices Newsom and Racanelli are biased in favor of the Bank and disqualified to sit on any appeals involving the Bank, and an injunction enjoining their practice of rendering biased and unjust decisions in favor of the Bank." First Amended Complaint at para. 9. With regard to defendants Superior Court for Sonoma County and the Court of Appeal for the First Appellate District, plaintiff seeks a declaration that the O'Connell appellate decision and subsequent remittitur are invalid, an injunction against "enforcement of that invalid

decision," recall of the remittitur, a temporary restraining order and preliminary injunction preventing the Sonoma Superior Court and the Bank from conducting any further proceedings related to the remittitur, "a declaration that the Bank has unclean hands which bar any further prosecution of its appeal," or an injunction requiring assignment of the Bank's appeal and plaintiff's cross-appeal to another Division or District. Id. Finally, plaintiff seeks attorneys' fees and costs from the Justices, Bank and attorneys. Id.

The Sonoma Superior Court filed an answer to the complaint stating that it would not oppose an injunction barring further proceedings, but noting that such an injunction appears to be barred by the Eleventh Amendment to the United States Constitution, as well as by principles of equity, comity and federalism. All other defendants have moved to dismiss the complaint. In addition, defendant Justice Newsom moves to strike portions of the complaint under Federal Rule of Civil Procedure 12(f) and, in the event the motion to dismiss is denied, moves for summary judgment under Federal Rule 56. Defendants also move for sanctions against plaintiff's counsel under Federal Rule 11.

DISCUSSION

> It is the judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.

Pierson v. Ray, 386 U.S. 547, 554 (1967).

It is with this established principle in mind that the court turns to discussion of the motions to dismiss.

A. Federal Review of State Court Judgments

Federal district courts may not review state court judgments, even when those judgments are alleged to be in violation of the United States Constitution. Rooker et al. v. Fidelity Trust Co., 263 U.S. 413, 416 (1923) (federal district court has no jurisdiction to review allegation that state judgment rendered in violation of due process, equal protection and contract clauses of federal constitution; District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486-87 (1983) (no federal district court jurisdiction to review claim that Court of Appeals acted arbitrarily, capriciously, unreasonably or discriminatorily in denying petitioners for waiver of bar admission rule). Nor does the mere framing of allegations in terms of 42 U.S.C. § 1983 confer jurisdiction on the district courts to review state judgments. Reynolds v. Georgia 640 F.2d 702, 707 (5th Cir. Unit B), reh'g denied, 645 F.2d 272, cert. denied, 454 U.S. 865 (1981).

This principle, known as the Rooker-Feldman doctrine, bars plaintiff's suit. Under the doctrine, although parties may appeal state court judgments to the state's highest court, and then to the United States Supreme Court if a federal constitutional question is presented, "horizontal" review of a state court judgment in federal court is not available. Rooker, 263 U.S. at 416. See also MacKay v. Pfeil, 827 F.2d 540, 543 (9th Cir. 1987) (federal courts "may not serve as appellate tribunals to review errors allegedly committed by state courts.")

Stripped of its hyperbole, the complaint in this action seeks one principal result: the resurrection of plaintiff's trial court victory and multimillion-dollar verdict. Plaintiff spins out accusation after accusation regarding conspiracy, bias and deprivation of her rights, but the heart of her complaint is her dissatisfaction with the Court of Appeal's reversal of her trial verdict. This was effected, she claims, by the Court of Appeal's "switching theories" and failing to review the evidence from the trial in the light most favorable to the verdict.

These claims to the heart of the Court of Appeal's decision on the merits of plaintiff's case, and the claims were properly presented to the California Supreme Court after the Court of Appeal denied rehearing. The notion that a federal district court may somehow compel a state court of appeals to adopt or conform to a particular standard of review in conducting its appellate review is absurd on its face and unsupported by any authority. This court has no jurisdiction to grant plaintiff the relief she unsuccessfully sought in her state court appeals.

California provides a perfectly adequate and appropriate remedy for disgruntled litigants. That remedy is the right of appeal, and both plaintiff and the Bank of America exercised their right to appeal this action. Plaintiff has had all the review to which she is entitled.

Plaintiff attempts to avoid the force of the Rooker-Feldman doctrine by claiming that she seeks review not of the merits of the state court action, but of the procedure by which she was denied a fair and impartial panel. Her efforts are unavailing. Sunn v. Dean, 597 F. Supp. 79 (N.D. Ga. 1984), cited by defendants, is squarely on point. In that case, the federal district judge dismissed a civil rights complaint alleging conspiracy by jurors, a judge and state attorneys to deny plaintiff his constitutional rights to a fair trial, stating,

> This court further has no authority to decide constitutional issues which were raised, or reasonably could have been raised in the state court proceeding. All of plaintiff's allegations concerning the prejudice of the jury, the correctness of their verdict, the disparaging remarks by the trial judge, and the correctness of his rulings, could have been raised, and should have been raised, on direct appeal to the Georgia appellate courts. This court, therefore, has no jurisdiction or authority to consider any issues concerning the correctness of the judgment against plaintiff. Insofar as plaintiff's claims would require this court to reverse, vacate, or otherwise modify the judgment of the state court this court is without jurisdiction to hear them.

Id. at 80 (citations omitted). See also Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring) ("[w]here federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment"); Rosquist v. Jarrat Constr. Corp., 570 F. Supp. 1206 (D.N.J. 1983) (relief including voiding of state court judgments for alleged judicial bias unavailable under Feldman).

Under the Rooker-Feldman doctrine, therefore, this court may not entertain plaintiff's claims regarding the "switched theories" allegations, since to do so would necessarily entail reviewing the correctness of a state court judgment. Accordingly, plaintiff's fourth claim is dismissed.

B. Res Judicata and Collateral Estoppel

Insofar as plaintiff's claims of judicial bias and conflict of interest, as well as her "switched theories" claims, are based on a claim of conspiracy to violate her civil rights, they are barred by the doctrines of res judicata and collateral estoppel. The court will examine each in turn.

1. Res judicata

Res judicata "prevents litigation of all grounds for, or defenses to, recovery that were previously unavailable to the parties, regarding of whether they were asserted or determined in the prior proceedings." Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988) (citation omitted).

To determine whether the same claim or cause of action is involved for the purpose of res judicata, California law looks to the "primary rights" theory. "[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake . . . ." Clark v. Yosemite Community College Dist., 785 F.2d 781, 784 (9th Cir. 1986) (quoting Eichman v. Fotomat Corp., 147 Cal. App. 3d 1170, 1174 (1983), opinion amended and superseded by

Eichman v. Fotomat, No. 87-6532 (9th Cir., filed as amended July 13, 1989). A "primary right" is the "right to be free from the particular unlawful conduct." Clark, 785 F.2d at 784 (citation omitted).

The claims plaintiff brings here involve the identical "primary right" to be free from judicial bias she asserted in state court, and at the United States Supreme Court. Each was presented to the California Supreme Court in exhaustive detail in plaintiff's twenty-seven-page petition for review, Def. App. Ex. 1, her fourteen-page reply to the Bank's answer to the petition for review, Ex. 12, and her forty-eight page petition for rehearing after the Supreme Court's denial of review. Ex. 19. Her petition to the United States Supreme Court dealt principally with the judicial bias claim. Ex. 20.

Plaintiff states that her claims "are based upon the actions and conduct of the defendant Court of Appeal justices in conducting appellate review, and rendering decision on May 18, 1988 . . . ." Opp. to Bank's Motion at 14. She does not deny that the claims she advanced in state court of judicial bias, violations of equal protection and due process and "switching theories" all arose from these same actions and conduct. Instead, she attempts to avoid the inevitable res judicata effect of her prior litigation with a novel, though unavailing, argument. Plaintiff contends that the prior proceedings did not constitute a "lawsuit" for res judicata purposes because she did not first press her claims in a trial court. No authority is cited for this sweeping proposition, and this court rejects it. The California Supreme Court had ample opportunity to review plaintiff's claims, which were all premised on the same primary right. That court's rejection of those claims is res judicata in this court.

2. Collateral estoppel

Collateral estoppel bars relitigation of issues decided in prior proceedings if: "'(1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom

collateral estoppel is asserted was a party or in privity with a party at a prior [proceeding].'" People v. Sims, 32 Cal. 3d 468, 484 (1982) (quoting People v. Taylor, 12 Cal. 3d 686, 691 (1974)).

Plaintiff does not deny that the issues she seeks to litigate are so identical to those she raised in the California courts, save for the addition of the section 1983 label. Nor does she dispute that the third prong of the collateral estoppel test has been met. Instead, plaintiff contends that the California Supreme Court's denial of review was not a decision on the merits of her claims. In so asserting, plaintiff simply ignores the force of the Supreme Court's statement in denying her petition for review and her motion to take evidence (which gave the court yet another opportunity to review the same claims of bias and impropriety). The Supreme Court stated:

> The requests to take further evidence are DENIED because petitioners have not made a prima facia case showing of conflict of interest or bias, much less a deprivation of due process of law.

Order Denying Review, Def. App., Ex. 16.

As the California Supreme Court made clear in Sims, collateral estoppel does not require that an issue be tried; instead, "[a]n issue is actually litigated "[w]hen [it] is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined . . . . A determination may be based on a failure of . . . proof . . . ." 32 Cal. 3d at 484 (quoting Restatement (Second) of Judgments § 27 comment d at 255 (1982)) (emphasis in Sims). The Supreme Court's decision denying review of plaintiff's claims was a determination that the petition represented an absolute failure of proof. It was therefore a decision on the merits. See Restatement (Second) of Judgments § 27 comment d at 255 (1982) (determination based on failure of proof suffices for preclusion); Richer v. Superior Court, 63 Cal. App. 3d 748, 756 (1976) (where statement of reasons given, denial of petition for writ was decision on the merits); Miofsky v. Superior Court, 703 F.2d 332, 336 (9th Cir. 1983) (summary denial of

petition for writ of mandate is not decision on the merits unless reasons given.)[2]

Plaintiff's argument that because the Supreme Court's statement addressed only the sufficiency of her prima facie showing, it could not be a decision on the merits, is equally unpersuasive. Indeed, it is difficult to imagine a more forceful comment on the merits of a claim than to say it does not even rise to the level of a prima facie case. A prima facie case is established when the facts as pleaded, if true, make out a cognizable claim. A statement that no prima facie case has been made is virtually the strongest statement imaginable: even if every assertion in the pleading were true, no cause of action would lie. This is most assuredly a decision on the merits of a claim.

Plaintiff's statement that "the Court did not (and indeed could not) state that plaintiff would never acquire additional evidence in the future that would prove the justices were disqualified," Opp. to Bank's Motion at 23, reveals her lack of understanding of the basic legal principle of finality. The preclusive effect of a prior decision cannot be avoided by a proffer of new evidence. Evans v. Celotex Corp., 194 Cal. App. 3d 741, 748 (1987). This fundamental tenet prevents the very result plaintiff would achieve: endless litigation by losing parties asserting that new evidence required further review.

The court finds that plaintiff's claim of judicial bias and violations of due process and equal protection are barred by collateral estoppel, since those claims were asserted and rejected in her petition for review to the California Supreme Court, which remarked that she had failed to make even a prima facie base of bias of conflict of interest.[3] Accordingly, even if the Rooker-Feldman doctrine (see Section A supra) did not bar this court's exercise of jurisdiction, plaintiff's claims against defendants Newsom, Racanelli, Bank, Christian, Flinn, and the Leland firm are barred by res judicata and/or collateral estoppel.[4]

C. Court Defendants

Because the court grants the motions by defendants Justice Newsom, Justice Racanelli, Christian, Flinn, Leland firm, and Bank to dismiss the action, the court also dismisses the claims against the Superior Court for Sonoma County and the Court of Appeal. No claims of wrongdoing have been brought against the court defendants, and under the Rooker-Feldman doctrine, this court is without jurisdiction to grant the declaratory and injunctive relief plaintiff seeks, even if plaintiff's claims against the non-court defendants were meritorious. See Rooker, 263 U.S. at 416; Feldman, 460 U.S. at 487.

D. Defendants' Motions for Sanctions

Federal Rule of Civil Procedure 11 states that the "signature of an attorney or party constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information, and belief formed after reasonable injury, [the pleading] is well grounded in fact" and allows the opposing party to move for sanctions upon violation of the Rule.

In this case, the court shares defendants' concern for whether plaintiff's counsel conducted a reasonable inquiry into the facts supporting the serious allegations in the complaint before filing this action. The court is particularly concerned where an attorney makes contumelious assertions against a judge in an effort to attack an unfavorable decision rendered by the judge. Because such allegations attack the integrity of the judicial system as well as the judge, an attorney must be scrupulous in his investigation and statement of the facts.

In this case, some of the facts alleged in the complaint have nothing to do with the judge's purported relationship with the Bank of America. They relate to family and other dealings and they have been directly contradicted by the affected family members. Other matters asserted as fact have also been unequivocally refuted and the evidence submitted suggests that a responsible injury would have revealed the spuriousness of plaintiff's allegations. These rebuttal papers have not been

considered in the court's disposition of the motion to dismiss, but are considered in determining the viability of the sanctions motion.

In accordance with the above discussion, the court takes the motion for sanctions under submission and orders plaintiff's counsel to submit, within thirty days of this order, a declaration detailing the investigation counsel conducted before filing suit. The declaration shall detail, in particular, what investigation counsel undertook with relation to paragraphs 24.4 through 30 and paragraphs 38 through 50 of the complaint. Defendants may file a response to this declaration within fifteen days of its filing.

CONCLUSION

This court has no jurisdiction to overturn state court judgments. In addition, each of plaintiff's claims is barred by res judicata and/or collateral estoppel. Accordingly, the court DISMISSES the action with prejudice. The motions for sanctions are taken under submission. Plaintiff's counsel is to submit within thirty (30) days a declaration in accordance with the court's instructions in Section D supra. Defendants may respond to the declaration within fifteen (15) days of its filing.

IT IS SO ORDERED.

Dated: August 21, 1989

MARILYN HALL PATEL
United States District Judge

ENDNOTES

1. In explaining her "switching theories" allegation, plaintiff states that the Court of Appeal "deliberately review[ed] and revers[ed] plaintiff's judgment on legal theories different from the legal theories on which she recovered that judgment in the trial court." First Amended Complaint at para. 4. Even if violations of California judicial procedure could be adjudicated in a federal civil rights action, however, which they cannot, this "switched theories" claim would still be meritless. The California Court of Appeal has inherent power to decide any issue necessary to proper disposition of a case. See In re Marriage of Smith, 79 Cal. App. 3d 725, 744 n. 6 (1978) ("an appellate court, however, may consider any point proper disposition of the case appears to require, whether taken by counsel or not;") Burns v. Ross, 190 Cal. 269, 275-76 (1923) ("This court is undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not.")

2. Plaintiff cites People v. Triggs, 8 Cal. 3d 884, 890 (1973), which states:

> Preliminary we declare that our refusal to grant a hearing in a particular case is to be given no weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal when such opinion is in conflict with the law as stated by this Court.

The quoted passage, however, like the Advisory Comment to California Rule of Court 29 cited on page 19 of plaintiff's Opposition to the Bank's motion, does not advance plaintiff's argument. The quoted discussion does not state that a denial of review is not res judicata or collateral estopped as to the claims, issues, and parties in the action in which review was denied; instead, it goes to the precedential value of the Superior Court's action. Indeed, plaintiff's argument that a Supreme Court denial of review cannot be res judicata or have collateral estoppel effect proves far too much: if it were true, no action would ever be final unless

and until a full hearing were granted in the Supreme Court. This is not and has never been the law.

3. The court rejects plaintiff's argument that the Supreme Court's comment regarding plaintiff's failure to make a prima facie case applies only to plaintiff's motion to take evidence and not to her petition for review. The same arguments were made in both the motion and the petition. The Court rejected each in the same order. It defies common sense to believe that the Court's order should be read as deciding that no prima facie case of bias or conflict had been made out on the motion to take evidence, but expressing no opinion on the strength of the identical evidence and arguments in the petition for review.

4. Even if plaintiff, in her state court action, had not already brought each identical claim she now seeks to assert against each defendant, she would still be barred by res judicata and collateral estoppel. As discussed in section B(1) supra, res judicata applies "if two actions involve the same injury to the plaintiff and the same wrong by the defendant[s] . . . even if in the second suit the plaintiff pleads different theories, . . . seeks different forms of relief and/or adds new facts." Clark v. Yosemite Community College Dist., 785 F.2d 781, 784 (9th Cir. 1986) (quoting Eichman v. Fotomat Corp., 147 Cal. App. 3d 1170, 1174 (1983)). Because plaintiff complains of the deprivation of the same right, her right to a fair appellate panel, and the same injury, loss of her trial verdict, she is barred from relitigating new theories related to those same "primary rights."

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IRENE O'CONNELL KRUSE Plaintiff, -vs.- COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, et al., Defendants.	)	No. C-89-1440 MHP **MEMORANDUM AND ORDER** [Filed June 18, 1990]

Plaintiff Irene O'Connell Kruse originally filed this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging that defendants, acting under color of state law, had violated her constitutional rights. Although plaintiff's complaint was rife with allegations of conspiracy, in essence the relief plaintiff sought was to have this court overturn the state court's judgment. In an order dated August 21, 1989 this court presented a detailed and exhaustive analysis of plaintiff's claims, finding that the court was without jurisdiction to grant plaintiff the requested relief. Nonetheless, plaintiff has now filed a motion for reconsideration. The court had also taken under submission and requested additional submissions on defendants' motion for sanctions. Defendants have requested additional sanctions on plaintiff's latest declaration. Having considered the submissions of the parties, for the following reasons the court denies plaintiff's motion for reconsideration and grants defendant's motion for sanctions.

BACKGROUND

The background of the underlying action is set out fully in the court's order of August 21, 1989, and therefore only the facts pertinent to the present motion will be noted here. Plaintiff received a verdict in Sonoma County Superior Court awarding her over nine million dollars in compensatory and punitive damages. A panel of the Court of Appeal reversed plaintiff's judgment. Plaintiff's subsequent request for a rehearing was denied, as was her request that two of the justices from the appeal court panel be disqualified on conflict of interest grounds.

The California Supreme Court denied plaintiff's petition for review and her motion to take evidence and discovery, stating that plaintiff had no made a prima facie case of bias, prejudice or denial of constitutional rights. Plaintiff then filed a petition for certiorari with the United States Supreme Court alleging bias and a denial of due process. The Supreme Court denied certiorari.

Dissatisfied with the justice dispensed by these numerous tribunals, plaintiff then brought an action in this court alleging violations of her constitutional rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The court determined that because plaintiff was attempting to have this court overturn the state court decision, this court was "wholly without jurisdiction to entertain plaintiff's action." Order at p. 2. The bases of the court's decision were (1) to the extent that Kruse's complaints were based on the Court of Appeal's standard of review, the Rooker-Feldman doctrine, precludes review by this court; and (2) to the extent that Kruse's claims were based on an alleged conspiracy to violate plaintiff's civil rights, they were barred by res judicata or collateral estoppel. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 486-87 (1983).

DISCUSSION

I. Plaintiff's Motion for Reconsideration

Federal Rule of Civil Procedure 59(e) governs motions for reconsideration. Mir v. Fosburg, 646 F.2d 342, 344 (9th Cir. 1980); Fed. R. Civ. P. 59(e). A motion brought under Rule 59(e) should be denied when the moving party presents no arguments which were not raised at the prior hearing. Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985). Thus plaintiff cannot prevail on her reconsideration motion unless she presents new arguments.

A motion for reconsideration may be proper where the court must correct manifest errors of law or fact. In the present case, however, plaintiff's motion is based exclusively on misstatements and misunderstandings of: (1) this court's conclusions during the August 14 hearing and in the August 21 order; (2) the Rooker-Feldman doctrine; and (3) the principles of collateral estoppel and res judicata.

In the reconsideration motion, plaintiff alleges that this court failed to properly consider her due process claim. The grounds for plaintiff's allegation are misconstructions of this court's conclusions at the hearing at its subsequent order. At the hearing the court stated that "all of the underlying facts, allegations, [of plaintiff's federal court complaint] are the same [as plaintiff's state court complaints]. And they were heard, and they were rejected by the California Supreme Court. . . ." Pl. Reconsideration Memo at 3.

Somehow plaintiff interprets this statement as a holding by the court that plaintiff's conspiracy claim was not presented to or determined by the California Supreme Court. In fact, this court held that because plaintiff's conspiracy claim was based on the same issues and factual allegations underlying her state law claims, plaintiff's claim here was barred by the doctrines of res judicata and collateral estoppel.

Plaintiff's further basis for requesting reconsideration is grounded on a misconception of the Rooker-Feldman doctrine.

Despite plaintiff's lack of confidence, this court did correctly understand plaintiff's claims regarding it's power in relation to state courts. Plaintiff asserts that the Rooker-Feldman doctrine does not bar this court from "requir[ing] that each state court of appeal uniformly fairly and equally apply the same adopted standard of appellate review in all appeals coming before it." PL. MPA at 9.

However, this court is precluded from deciding whether the state Court of Appeal applied appellate review standards "with an equal hand." Allah v. Superior Court, 871 F.2d 887, 891 (9th Cir. 1989). Federal courts "do not have jurisdiction over direct challenges to final decisions of state courts, even if those challenges allege that the state court's action was unconstitutional. This rule applies even though the direct challenge is anchored to alleged deprivations of federally protected due process and equal protection rights." Id. at 890-91 (citations omitted).

Miofsky v. Superior Court, 703 F.2d 332 (9th Cir. 1983), relied on by plaintiff, was decided prior to the Supreme Court's decision in Feldman and is no longer the law in the Ninth Circuit as applied to section 1983 actions. Worldwide Church of God v. McNair, 805 F.2d 888, 893 n.4 (9th Cir. 1986).

Plaintiff's next argument for reconsideration is that this court erred in finding that the California Supreme Court's decision was a final adjudication on the merits. The California Supreme Court denied plaintiff's petition for discretionary review explicitly stating that the reason for its denial was plaintiff's failure to "make a prima facie showing of conflict of interest, or bias much less a deprivation of due process of law." Order at 14. Plaintiff argues that this denial and its accompanying statement of the reason for denial do not constitute a decision on the merits. Plaintiff's argument flies in the face of established legal authority.

Denial of a petition for appellate review is determined to have been on the merits where the court provides the reasons for its denial. Consumer Lobby Against Monopolies v. Public Utilities Commission, 25 Cal. 3d 891, 901; Richer v. Superior

Court, 63 Cal. App.3d 748, 756 (1976). The California Supreme Court, by stating outright that plaintiff failed to make a prima facie showing, clearly addressed the merits of plaintiff's claim. The discretionary nature of the review process is irrelevant. Miofsky v. Superior Court, 703 F.2d 332, 336 (9th Cir. 1983) (denial of writ of mandate is given preclusive effect where "it affirmatively appears that the denial was intended to be on the merits.")

Finally, plaintiff attempts to assert that she was not accorded a full and fair hearing on the merits of her constitutional claims and therefore neither the Rooker-Feldman nor res judicata principles should apply. First, the application of res judicata does not require that the court below allowed for discovery or a full evidentiary hearing. Garcia v. Superior Court, 156 Cal. App. 3d 670, 677-78 (1984). Only minimum federal due process requirements need be satisfied. Kremer v. Chemical Construction Corp., 456 U.S. 461, 484-85 (1982). Furthermore plaintiff's claim was reviewed by the California Supreme Court and plaintiff exercised her option to file a petition for certiorari to the United States Supreme Court.

Plaintiff's reliance on Robinson v. Arivoshi, 753 F.2d 1468 (9th Cir. 1985) vacated on other grounds, 477 U.S. 902 (1986) is based on a misconstruction of the facts of that case. In Robinson the Hawaii Supreme Court never considered the federal constitutional claims, whereas in the present case, although they were rejected, plaintiff's federal constitutional claims were considered by the California Supreme Court.

II. Defendants' Motion for Sanctions

Along with their earlier motions the defendants requested that sanctions be imposed on plaintiff's attorney. In its order of August 21, 1989, the court explained that it shared defendants' concerns that plaintiff's attorney had not made sufficient investigation to support such contumelious assertions. The court required plaintiff's counsel to submit a declaration detailing the investigation undertaken prior to filing suit. The court has now reviewed the declaration of plaintiff's attorney, Frederick Watson, and the accompanying papers of counsel for

both plaintiff and the defendants. Defendants have also requested additional sanctions based on attorney Watson's declaration.

A. Legal Standard for Sanctions

Federal Rule of Civil Procedure 11 requires that all pleadings, motions, and other papers filed with the court be, to the best of the attorney's knowledge, information and belief after reasonable inquiry, "well grounded in fact." Fed. R. Civ. P. 11. The attorney's signature on the papers signifies a warranty that it is not "interposed for any improper purpose, such as to harass. . . ." Id. If the attorney fails to comply with these requirements, the court must impose sanctions against the attorney, represented party, or both. Id. (emphasis added).

Plaintiff's counsel attempts to frame the legal standard for awarding sanctions as one where "the facts discovered by counsel of plaintiff, and the reasonable inferences to be drawn therefrom, must give rise to a reasonable suspicion that the claim to be asserted will be found to be factually supportable after reasonable discovery has been allowed." Pl. Sanctions Memo. at 1-2. However, the authority cited in Mr. Watson's own memorandum contradicts his asserted understanding of the legal standard. The court in Jensen Electric Co. v. Moore, Caldwell, Rowland & Dodd, 873 F.2d 1327 (9th Cir. 1989) stated that a complaint is not frivolous if it is "well-grounded in fact." Id. at 1329 (quoting Greenburg v. Sala, 822 F.2d 882, 887 (9th Cir. 1987). There is a substantial difference between something being "well-grounded in fact" and something which is the product of a suspicion drawn from an inference deduced from a fact.

This court, like the Jensen court, is concerned with the reasonableness of the inquiry conducted by plaintiff's counsel. See Jensen, 873 F.2d at 1330; Rachel v. Banana Republic, 831 F.2d 1503, 1508 (9th Cir. 1987) (attorney has affirmative duty of investigation as to law and fact prior to filing). Moreover, the gravity of the charges made by Mr. Watson requires a more rigorous standard of inquiry. MGIC Indem. Corp. v.

Weisman, 803 F.2d 500, 505 (9th Cir. 1986) ("A complaint filed in federal court is not a vehicle for airing rumor, suspicion, or mere hostility.") Plaintiff's counsel cannot insulate himself from liability by citing to some minuscule amount of "inquiry," which is in fact fraught with hearsay and double hearsay problems, from which he has drawn inferences amounting to flights of fancy which no court could hold were reasonable. See Schwarzer, Sanctions Under the New Federal Rule 11 - A Closer Look, 104 F.R.D. 181, 187 (1985) ("facts adduced "must consist of admissible evidence or at least be calculated to lead to such evidence.") The Ninth Circuit's stated reluctance to impose sanctions for "factual errors" cannot justify Mr. Watson's unsupported ad hominem attacks which, were they not couched in terms of a complaint, might be the basis for a libel suit. Jensen, 873 F.2d at 1330.

B. Watson's Accusations

This court is astounded by the breadth and number of times Mr. Watson makes accusations of perjury, bribery, conspiracy, embezzlement and blackmail without any factual basis and continues to do so even within his present declaration, which is supposed to provide this court with the factual basis for his prior accusations.

1. Assertions against Justice Newsom

The court will provide just a few examples of Mr. Watson's calumny. Mr. Watson has accused Bank of America of: (1) having "bribed" Justice Newsom by lending him $50,000 in 1980 (years prior to the plaintiff's suit against the Bank); and (2) of having "bribed" the Justice again by lending him an additional $50,00 in credit in 1987, which Watson alleges the Justice "desperately" needed but was not "creditworthy" to obtain rightfully.

Watson further accused Justice Newsom of having been blackmailed by attorney Flinn, who had purportedly "discovered" that the justice had "embezzled" money from his parents' estate. Most recently, Mr. Watson has added to the vitriol by accusing Justice Newsom of further violations of his

duties as executor of his parents' estate and of having "removed" money from a family corporation to invest in a casino in Nevada.

Justice Newsom at the time of the summary judgment motion provided declarations from former business partners and from his siblings each of which unequivocally refutes Watson's allegations. Moreover, facts adduced by the defendants which were clearly available to Watson prior to filing his papers give lie to Watson's allegations.[1] Additionally, although Watson's papers are rife with serious allegations, he never contacted the very individuals most able to verify the "facts" he alleged.[2]

Nor do the papers submitted stand for the propositions for which Watson cites them. In support of his claim that Justice Newsom's behavior with respect to his family trust would amount to criminal embezzlement, Watson produces a mere three documents from the probate court. App. Exs. 10-12. None of these documents even intimates wrongdoing on the part of Justice Newsom.

2. Allegations of conspiracy among Bank of America, Attorney Flinn, the Leland Parachini Firm, Winslow Christian and Justice Newsom

As noted above, Watson has accused defendants of conspiring to obstruct justice. Attorney Watson tries to convince this court that the duty to adequately investigate accusations which impugn the integrity of individuals and of judges (and by extension of the judicial system), can be based on having "spoke[n] with a witness who had overheard attorney Flinn . . . in the next booth at a restaurant" or having "spoke[n] with a witness who was standing outside the house next door to William Sullivan's [branch manager of the Bank of America] home who heard . . . ." Watson Dec. at 6, 7-8. Mr. Watson's declaration does not provide the names or sworn affidavits of these individuals who just happen to be overhearing these conversations and who he ostensibly believes would attest under oath to the veracity of their eavesdropping.

Watson's "factual basis" was also grounded on William Lukens, Watson's colleague, having once told Watson that attorney Flinn had once told Lukens that Flinn represented the siblings of an unnamed judge who had been "caught in a very embarrassing situation that resulted in a very sensitive family dispute." This second-hand rumor was the foundation on which Watson constructed his entire embezzlement/blackmail sand castle.

Another purported "fact" on which Watson based his "reasonable suspicions" was a conversation with a former colleague of Mr. Flinn's, who had known Mr. Flinn for approximately one year and who purportedly stated that Mr. Flinn's philosophy was to "win at any cost." Watson Dec. at 8. From the mere opinion of an unnamed individual, who barely knows Mr. Flinn, Watson is willing to assert as "fact" any alleged misdeed he wishes.

Further, Watson examined both Mr. Sullivan and one of the other bank officers at trial, both of whom denied the substance of Mr. Watson's accusations. Nonetheless, without any substantiation whatsoever, Mr. Watson apparently thinks nothing of blithely asserting that Mr. Sullivan "did perjure himself." Id. at 7 (emphasis added). Perhaps Mr. Watson, despite his self-asserted competency and integrity,[3] believes that our legal system permits an accusation to stand as the truth unless proven otherwise.

Mr. Watson's theories and accusations change to suit him. Early on in the proceedings Watson accused the three panelists on the Court of Appeal of "favoring" Bank of America in order to obtain "nomination to the federal bench or appointment to government positions, in a Dukakis administration" despite the fact that one of the justices was 85 years old at the time and a lifelong Republican. Newsom Memo at 2 n.1.

In his most recent filing, Watson's theory changes once again. Now, according to Watson,

> [t]he evidence which ultimately controlled [his] decision to include the Bank, Mr. Christian, Mr.

> Flinn and his law firm, as defendants in this action, and allege a conspiracy and seek damages. . . was the evidence of Justice Newsom's involvement with Gilbert Chilton, in a similar conspiracy. . . .

Watson Dec. at 9-10.

The latest "conspiracy" alluded to by Watson is allegedly among Justice Newsom, Gilbert Chilton, Tom Ginella and possibly others. Justice Newsom's alleged role was to "use his personal friendship and political influence with California governor Jerry Brown, and California Assembly Speaker Willie Brown, to have Chilton appointed . . . ." Watson Dec. App. at 14.

In support of these rantings, Watson appends newspaper articles and the transcript of Chilton's federal sentencing. This court has combed those submissions and finds nothing which even mentions Justice Newsom, let alone in any way props up this far-fetched theory. In fact, the very papers cited by Watson contradict him. At Chilton's sentencing, the idea of appointing Chilton came from a realtor and Chilton's employer at Guarantee Savings and Loan in Fresno. Watson Ex. 15 at 21.

Mr. Watson has not submitted any evidence at all tying Mr. Christian into these alleged conspiracies. In addition to the "bribery" theory against Bank of America based on its loans to Justice Newsom, which the court disposed of above, Watson has pleaded an equally implausible theory of conspiracy based on the fact that both Justice Newsom and Bank of America were at one time trustees for the Getty Children's Trust. Watson initially posited that Justice Newsom and the Bank were co-trustees and that this was evidence of Justice Newsom's "strong ties" to the Bank.

When Watson was forced by this court to prove what investigation he had undertaken to substantiate these claims, he discovered that he had erred and that when Justice Newsom became a trustee, the Bank was no longer on the Board. Watson attempts to explain this error by stating that their

"investigation disclosed no information that the Bank of America had resigned. . . ." Watson Dec. at 11. It appears to this court that the information could have been obtained easily by either contacting the Trust Fund or the Bank.

Undeterred by the facts, Watson presents an alternate theory in his latest declaration, namely that the Bank had resigned "for the express purpose of conferring a substantial financial benefit . . . upon Justice Newsom. " Id. at 11-12. Once again, Watson presents no facts and tries to support his allegations by terming them a "reasonable inference." Id.

The court is very disturbed at Mr. Watson's conduct. He has made baseless assertions against several well-respected state court judges and a former state court judge. While their reputations will remain unsullied by spurious attacks, they must nonetheless defend against them. The cost of personal and public purse and to the judicial process is great.

In attempting to justify groundless accusations, yet more groundless accusations have been spun. In the process yet more judges are swept into the "conspiratorial" net by implication. For example, in order to give Mr. Watson's stories about this case and the Sanchez-Corea case plausibility, the other judges joining those opinions would have had to be unduly influenced. In the Sanchez-Corea case none of the defendants here authored the opinion. Will Mr. Watson next allege that the judge who did author the opinion was also part of this ever-growing "conspiracy?" Will he assert that another panel of judges, which recently rejected his client's effort to amend the complaint in the underlying state court proceeding is also a part of this "conspiracy?" See Bank of America National Trust and Savings Association v. Superior Court, 1990 Cal. App. LEXIS 510 (May 18, 1990). Will he next contend that the judges in this case and other judges who have rendered decisions in other lender liability cases favorable to the lenders are up to more mischief? See, e.g., Price v. Wells Fargo Bank,. 213 C.A.3d 465 (1989); Mitsui Manufacturers Bank v. Superior Court. 212 C.A.3d 726 (1989).

These questions are not idle given Mr. Watson's grandiose fantasies and conspiracy theories. They merely serve to point out the lengths to which he will go to bolster his far-fetched claims. Like a weaver of false tales once caught in a web of his own spinning, Mr. Watson has continued to elaborate upon those tales with further falsities and fanciful glosses.[4]

CONCLUSION

As noted above, the court finds plaintiff's motion for reconsideration to be wholly without merit and to be nothing more than a re-hash of the same misunderstandings and misrepresentations of the law. Additionally, the court has reviewed the voluminous submissions of attorney Watson and finds that, not only did Watson fail to make a reasonable inquiry into the facts underlying his allegations, he misinterpreted and ultimately misrepresented the facts contained in the information he did have at hand.[5] Particularly given the gravity of the accusations he has lodged, the court finds that Watson has in no way fulfilled the obligation of conducting a reasonable inquiry imposed by Rule 11 of the Federal Rules of Civil Procedure.

When ordinary avenues of review proved unfavorable, Mr. Watson set upon a course of making vituperative attacks upon the honesty and integrity of the judiciary. He made serious allegations of misconduct protected by the guise of a complaint and another lawsuit. This behavior not only violates Rule 11, it is irresponsible and contumacious. See note 3, supra. Mr. Watson was not satisfied to make groundless assertions in the original complaint, he has compounded these violations by adding further baseless assertions in his most recent submission. The casualness with which these assertions are made, without any admissible evidence or in the face of contrary evidence, raises serious questions about counsel's behavior in the process. Watson does a grave disservice to the defendants and to the judicial system.

The court has wide discretion under Rule 11 to determine the amount of the sanctions award. See Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1163 (9th Cir. 1987).

The defendants have requested attorneys fees and costs associated with defending against plaintiff's allegations as well as between $100,000 and $200,000 in fines to act as a deterrent.

Given the amount of attorneys' fees at this point,[6] the court finds that an award of attorneys' fees and costs is an appropriate sanction.[7] While deterrence sanctions may be appropriate on this record, if the sanctions imposed above are not sufficient to deter Mr. Watson from again filing such scurrilous claims or making allegations without conducting the proper factual determinations, then it is unlikely that additional monetary sanctions will provide any greater deterrent.

Indeed, Mr. Watson's conduct sinks far below the level of conduct contemplated by Rule 11. He may have taken himself beyond deterrence into the perilous realm of conduct proscribed by the Rules of Professional Conduct. Observing Mr. Watson's manner of litigating in this action, the court has grave concerns regarding his representation of this and other clients. If Mr. Watson believes that this is a proper means of redressing the claims of his clients or obtaining review of unfavorable decisions, he seriously misperceives his obligations as an attorney and officer of the court.

Based upon this court's review of the entire record Mr. Watson has concocted in this case, it appears that he has violated Rules 3-200 and 5-200(A), (B), (C) and (E) of the California Rules of Professional Conduct and Rule 110-3 of the Local Rules of this court. Referral for inquiry by the prescribed regulatory bodies is a more effective and appropriate response than further monetary sanctions.

Accordingly, plaintiff's motion for reconsideration is DENIED. Defendants' motion for sanctions is GRANTED, the amount to be paid by Frederick Watson. Defendants are to submit within fifteen (15) days from the date of this order declarations as to the amount of attorney's fees and costs expended in opposing plaintiff's complaint and responding to attorney Watson's declaration. Attorney Watson will then have

fifteen (15) days to respond only as to the reasonableness of the fees.

IT IS SO ORDERED.

Dated: June 18, 1990

MARILYN HALL PATEL
United States District Judge

ENDNOTES

1. For example, in the first amended complaint, Watson asserted that Bank of America "bribed" Justice Newsom by lending him $50,000 in December 1980 to avoid foreclosure on a condominium loan. The loan was in fact not a personal loan, but a loan to both Justice Newsom and Tom Englund and was a restaurant, not a condominium. Furthermore, the default in the amount of only about $2,0000 [sic], and thirdly, Justice Newsom had sold his interest in the property two years before the default was filed. Not only were these facts available to Watson prior to filing, some of the true facts were contained in documents appended to the pleadings. See App. Ex. 8:3____ (notice of default and deed of trust on Justice Newsom's _____ Flat home).

Furthermore, in May of 1982, one month after Justice Newsom allegedly entered into the "conspiracy" with the Bank he paid off the $50,000 loan. Req. for Judicial Notice, ____ E.

2. Although Watson asserts that Justice Newsom "embezzled" money from his family trust account, Watson never seems to have contacted Justice Newsom's siblings to corroborate these allegations. All of Justice Newsom's siblings have provided declarations which counter these allegations. See declarations of Sharon Newsom Mohun; Brennan Newsom; Carole Onorato; Patrick Newsom; and Barbara Newsom.

3. Defendants have presented evidence that plaintiff's attorney has a history of attempting to have justices from whom he has determined he might not be able to win on the merits recused.

At least two of these, besides this court, have questioned Watson's integrity. In 1980, Watson, representing plaintiffs in Deal Development Co., Judicial Council Coordination Proceeding No. 318 (San Francisco Superior Court) moved to disqualify then Judge (now Justice) John E. Benson. At oral argument on the disqualification motion, Judge Benson

stated for the record that he questioned Mr. Watson's integrity and that for that reason he chose to recuse himself.

Similarly, in 1981 in proceedings on the same case, Watson sought disqualification of Judge Eugene F. Lynch (now on the Federal bench, then sitting on the Superior Court), questioning the Judge's ability to be unbiased in light of his pending nomination to the federal bench. Judge Lynch also recused himself, stating that the fact that Watson sought to disqualify him gave him "problems." Moses Dec., Exs. B, C.

Additionally, on November 17, Watson filed with this court a request that the court sua sponte disqualify itself, questioning this court's ability to be impartial, by citing to this court's ruling favorable to Justice Newsom and some wholly unrelated criminal case involving narcotics trafficking. Memo re Constitutional Objections at 21.

4. Shakespeare said it best and most succinctly: "Slander lives upon succession, Forever housed where it gets possession." The Comedy of Errors.

5. Furthermore, Mr. Watson has repeatedly, both in his original submission and then in his motion for consideration, misinterpreted and ignored the principles of res judicata and the Rooker-Feldman doctrine and misrepresented the applicable case law. Although the legal conclusions Watson draws would serve as an independent basis for sanctions, the alleged "factual" assertions contained in the pleadings are so egregious as to easily support defendants' motions for sanctions and therefore the court will not address the alternative basis.

6. Justice Newsom's attorneys have submitted a figure of approximately $177,000 to date in attorney's fees and costs. It is unclear to the court whether this figure is a total for all attorneys or whether it simply represents the amount for representation of Justice Newsom.

7. It is possible that the legal representation of the justices will ultimately be borne by the taxpayers. Cal. Gov. Code §§ 995, 996. No matter; the court is equally concerned whether the cost is being borne by individuals or comes out of the public fisc.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IRENE O'CONNELL KRUSE	)	
	)	
Plaintiff,	)	No. C-89-1440 MHP
	)	
-vs.-	)	
	)	**MEMORANDUM AND ORDER**
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, et al.,	)	[Filed August 22, 1990]
	)	
Defendants.	)	
	)	

Plaintiff Irene O'Connell Kruse originally filed this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging that defendants, acting under color of state law, had violated her constitutional rights. In an order dated August 21, 1989 this court found that it was without jurisdiction to grant plaintiff the requested relief. On June 18, 1990 the court denied plaintiff's motion for reconsideration and granted defendants' motion for sanctions.

At that time, defendants were requested to submit declarations as to the amount of attorneys' fees and costs, and plaintiff's counsel was given time to respond only as to the reasonableness of the fees and costs requested. The court noted that these were the only submissions it sought.

In spite of the court's clear orders, counsel for defendant Justice Newsom filed a reply, to which reply plaintiff filed a response. Additionally, the attorney general's office, which represents defendant California State Court of Appeal submitted copies of two orders relating to other actions of Mr. Watson in front of the California Court of Appeal, to which submission

Mr. Watson reacted by filing a twelve-page response. The court did not entreat and will not allow the uninvited submissions mentioned above. Accordingly, all submissions beyond defendants' counsels' declarations and Mr. Watson's initial reply are stricken.

Second, Mr. Watson asserts that he is being denied due process because, notwithstanding the extraordinarily voluminous submissions he made on this matter, the court did not hold a hearing. As support for this position Mr. Watson cites to Tom Growney Equip. v. Shelly Irrigation, 834 F.2d 833, 835-37 (9th Cir. 1987). However, Mr. Watson not surprisingly neglects to mention that in the later case of Hudson v. Moore Business Forms, 898 F.2d 684, 686 (9th Cir. 1990), the Ninth Circuit, also citing Tom Growney, stated that the only necessary due process protections in a sanctions action are "notice and an opportunity to respond." In Hudson, the Ninth Circuit affirmed this court's imposition of sanctions without an opportunity to respond orally, where the party to be sanctioned was notified of the action and was give full opportunity to respond in writing. As Mr. Watson's declaration alone totalled in excess of 400 pages, he can hardly be heard to complaint that he did not have a sufficient opportunity to respond in writing.

As to the reasonableness of the fees and costs requests, the request of the attorney general's office for $15,141.45 in fees and for $40 in costs is not unreasonable and is therefore granted. See Matter of Yagman 7906 F.2d 1165 (9th Cir. 1986). Similarly, the application of Anthony Tepel, attorney for Justice Racanelli, for $23,392.50 in fees and $1,864.28 in costs is found to be reasonable and granted. These amounts are well within the range, if not low, for responding to plaintiff's voluminous submissions.

The application by Justice Newsom's counsel, the law firm of Orrick Herrington & Sutcliffe ("Orrick"), for fees and costs in excess of $224,000 is somewhat problematic. The court recognizes that the allegations against Justice Newsom were wide-ranging and did not lend themselves to being easily deciphered. The court also recognizes that the rambling nature

of Mr. Watson's copious filings throughout the proceedings would dramatically increase the workload of any conscientious attorney seeking an adequate response to claims the nature of which were difficult to fathom. However, it appears to the court that having employed a cadre of partners (five), associates (four), summer law clerks (four), legal assistants (eight), as well as using the services of the library staff and an investigator, amounted to overkill. The court can understand the need to meet the inordinate number of serious and scandalous charges with forceful advocacy. Such heavy staffing, however, suggests duplication of effort and failure to effectively delegate work.

Accordingly, the court will deduct 20% from the billings of partners Richard Lucas ($92,820.00) and Barbara Moses ($71,826.25) for a total of $131,717.00. None of the fees for any of the other partners consulted on this matter will be compensated. As for associate time, only the work of Ms. Smiley, who stood in for Ms. Moses while she was out of the office during November and December of 1989 is to be compensated. This work of Mrs. Smiley totals $6,300.00 in fees.

Additionally, because as the court expressed above, it concludes that work was duplicated, it will only provide fees for the work of one legal assistant and one summer clerk. Mr. Correll's labors, at a cost of $2,305.62 are to be compensated, as is the work of summer law clerk Tom Klein who researched jurisdiction issues, drafted an application for leave to file an oversized brief and researched the standards under Rule 11, issues clearly relevant to the case. Mr. Klein's work was billed at $3,750.00. The court will grant reimbursement for costs in full in the amount of $15,365.87, as well as the fee of the private investigator at $6,598.98. The total of $144,072.62 in fees and $21,964.85 in costs is therefore to be paid to the Orrick firm.

CONCLUSION

Accordingly, all submissions beyond defendants' counsels' declarations and Mr. Watson's initial reply are stricken.

Plaintiff's counsel Frederick Watson is to pay the attorneys' fees and costs enumerated above within ninety (90) days from the date of this order.[1]

IT IS SO ORDERED.

Dated: August 22, 1990

MARILYN HALL PATEL
United States District Judge

ENDNOTES

1. Mr. Watson recently claimed that imposing sanctions on him will reduce him to filing for personal bankruptcy. However, the court notes that in his earlier declarations, as evidence of his prowess as an attorney in these types of actions, Mr. Watson was only too eager to tout his string of successes in obtaining numerous multimillion dollar judgments for other clients. See Declaration of Frederick Watson re Possible Imposition of Rule 11 Sanctions at p. 5 (recoveries in excess of $20 million for similarly situated clients). Absent evidence of profligacy or some indication that Mr. Watson's services in these actions were provided pro bono publico, the court assumes that Mr. Watson indeed has the ability to satisfy this judgment.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRENE O'CONNELL KRUSE,	)	No. 90-16133
	)	
Plaintiff-Appellant,	)	D.C. No. CV-89-1440-MHP
v.	)	
	)	MEMORANDUM*
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,	)	[Filed October 24, 1991]
	)	
Defendants-Appellees.	)	

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

IRENE O'CONNELL KRUSE,	)	No. 90-16444
	)	
Plaintiff,	)	D.C. No. CV-89-1440-MHP
and	)	
FREDERICK WATSON	)	
Appellant,	)	
v.	)	
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,	)	
Defendants-Appellees.	)	
	)	No. 90-15201
IRENE O'CONNELL KRUSE,	)	
	)	D.C. No. CV-89-1440-MHP
Plaintiff-Appellant,	)	
v.	)	

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, presiding

Argued and Submitted September 13, 1991
San Francisco, California

Before: GOODWIN, SCHROEDER, and NOONAN,
Circuit Judges

The appellants' motion for leave to file a late Amended Reply Brief is granted.

We affirm the judgment and the imposition of sanctions for the reasons stated by the trial judge in her memorandum and orders below. Furthermore, we award double costs on appeal pursuant to 28 U.S.C. § 1912 and Fed. R. App. P. 38.

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRENE O'CONNELL KRUSE,	)	No. 90-16133
	)	
Plaintiff-Appellant,	)	D.C. No. CV-89-1440-MHP
	)	
v.	)	
	)	ORDER
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,	)	[Filed December 12, 1991]
	)	
Defendants-Appellees.	)	

IRENE O'CONNELL KRUSE,	)	No. 90-16444
	)	
Plaintiff,	)	D.C. No. CV-89-
	)	1440-MHP
and	)	
	)	
FREDERICK WATSON	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,	)	
	)	
Defendants-Appellees.	)	
	)	
	)	No. 90-15201
IRENE O'CONNELL KRUSE,	)	
	)	D.C. No. CV-89-
Plaintiff-Appellant,	)	1440-MHP
	)	
v.	)	

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,

Defendants-Appellees.

Before: GOODWIN, SCHROEDER, and NOONAN, Circuit Judges

Appellant's motion for leave to file supplemental brief in support of petition for rehearing is GRANTED.

The petition for rehearing is DENIED.

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRENE O'CONNELL KRUSE, Plaintiff-Appellant, v. COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN, Defendants-Appellees.	)	No. 90-16133 D.C. No. CV-89-1440-MHP ORDER [Filed March 5, 1992]

IRENE O'CONNELL KRUSE,	)	No. 90-16444
	)	
Plaintiff,	)	D.C. No. CV-89-1440-MHP
and	)	
	)	
FREDERICK WATSON	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,	)	
	)	
Defendants-Appellees.	)	
	)	
---	)	No. 90-15201
IRENE O'CONNELL KRUSE,	)	
	)	D.C. No. CV-89-1440-MHP
Plaintiff-Appellant,	)	
	)	
v.	)	

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,

Defendants-Appellees.

Before: GOODWIN, SCHROEDER, and NOONAN, Circuit Judges

Appellants' motion to supplement their objection to appellees' motion for attorneys' fees on appeal and to supplement their request for investigation of fraud on the court is GRANTED.

Appellee California Court of Appeal's motion for attorneys' fees on appeal is GRANTED. 28 U.S.C. § 1912, Fed. R. App. P. 38. Appellant Watson is hereby directed to pay the Court of Appeal the sum of $7,218.75.

Appellee Justice Newsom's motion for attorneys' fees on appeal is GRANTED. 28 U.S.C. § 1912; Fed. R. App. P. 38. Appellee Justice Newsom is hereby directed to submit an itemized statement setting forth the amount of attorneys' fees incurred on appeal, together with appropriate supporting declarations.

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRENE O'CONNELL KRUSE, Plaintiff-Appellant, vs. COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST DISTRICT, et al., Defendants-Appellees.	No. 90-16133 DC# CV-89-01440-MHP Northern California (San Francisco)
IRENE O'CONNELL KRUSE, Plaintiff, and FREDERICK WATSON, Appellant, vs. COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, et al., Defendants-Appellees.	No. 90-16444 DC# CV-89-01440-MHP Northern California (San Francisco) ORDER [Filed August 21, 1992]

IRENE O'CONNELL KRUSE,	)	No. 91-15201
	)	
Plaintiff-Appellant,	)	DC# CV-89-01440-MHP
vs.	)	Northern California
	)	(San Francisco)
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, et al.,	)	
Defendants-Appellees.	)	

Before: GOODWIN, SCHROEDER and NOONAN, Circuit Judges

Appellee William Newsom's unopposed request for attorneys' fees in the amount of $71,010.00 is granted.

APPENDIX H

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FREDERICK E. WATSON,	)	
	)	
Plaintiff,	)	No. C-94-0425 MHP
vs.	)	No. C-89-1440 MHP
ANTHONY J. TREPEL, et al.,	)	(related cases)
	)	
Defendants.	)	ORDER
	)	
	)	[Filed June 14,
IRENE O'CONNELL KRUSE,	)	1994]
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
COURT OF APPEAL OF THE STATE OF CALIFORNIA, et al.,	)	
	)	
Defendants.	)	
	)	

This court will waste no more time and effort than is absolutely necessary in disposing of plaintiff Frederick Watson's latest attempt to circumvent the rule of law.

The long and sorry history of Mr. Watson's actions is well documented in previous orders of this court and, indeed, can be surmised from a brief review of the exhibits submitted by Mr. Watson as part of his complaint. For present purposes all that is required as background is the following: (1) by order filed August 21, 1989 this court dismissed the complaint in the matter Kruse v. Court of Appeal of the State of California, et al., No. C-89-1440 MHP [hereinafter "Kruse"]; (2) Mr.

Watson was counsel for the plaintiff in the Kruse action; (3) by order filed June 18, 1990 this court denied Mr. Watson's motion for reconsideration and granted the Kruse defendants' motion for Rule 11 sanctions against Mr. Watson; (4) on appeal the Ninth Circuit summarily affirmed both orders in full "for the reasons stated by the trial judge," Kruse v. Court of Appeal of the State of California, Nos. 90-16133, 90-16444, slip op. (9th Cir. Oct. 24, 1991); (5) Mr. Watson's petition for certiorari to the United States Supreme Court was denied; (6) on February 4, 1994, Mr. Watson filed the instant complaint, C-94-0425 MHP, which was originally assigned to Judge Legge of this court, in which he seeks a declaration that this court's order in Kruse granting Rule 11 sanctions is void; (7) this court ordered the instant action and Kruse related on March 17, 1994; (8) on February 28, 1994 defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), and moved for an award of fees and costs for this action.

Mr. Watson's complaint lacks any basis in law or fact, and is therefore subject to dismissal. The "law of the case" doctrine prevents this court from revisiting issues once decided and affirmed on appeal except in extraordinary circumstances.

> [A] decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court . . . unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice."

Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 833 (9th Cir. 1982). Under this doctrine, even if the court were inclined to entertain Mr. Watson's complaint it could not do so. No new evidence has come to light, there has been no change in the controlling law, and the previous decisions of this court were not only not clearly erroneous but quite correct in law and fact. Accordingly, defendants' motion to dismiss shall be granted.

Pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927, defendants have moved for attorneys' fees, costs and any other sanctions this court deems warranted, on the grounds that Mr. Watson has unreasonably and vexatiously multiplied these proceedings by filing the instant complaint. This court has the discretion to award fees and costs and to impose sanctions where a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Chambers v. Nasco, Inc., ___ U.S. ___, 111 S. Ct. 2123, 2133 (1991). Mr. Watson's conduct in filing this action amounts to no less than abuse of process and demonstrates his continuing contempt both for this court and for the legal system as a whole. This court's sanction order was affirmed in full by the Ninth Circuit, and the United States Supreme Court declined review. Mr. Watson thus litigated his claim that the sanction order was unconstitutional to the fullest extent possible. Nonetheless, he returns to this court seeking relief to which he knows he is not entitled in an effort to forestall defendants from recovering judgment against him, thus forcing both this court and defendants to engage in further time-consuming and costly efforts. Mr. Watson's conduct is the very definition of vexatious and oppressive litigation. Accordingly, defendants' motion for attorneys' fees and costs is granted.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED:

(1) that defendants' motion to dismiss is GRANTED, and this action is dismissed with prejudice;

(2) that defendants' motion for attorneys' fees and costs is GRANTED; within thirty (30) days of the date of this order, defendants shall submit declarations setting forth the fees and costs expended in responding to this action and preparing this motion to dismiss; Mr. Watson shall then have fifteen (15) days within which to respond only as to the reasonableness of the fees. Mr. Watson is cautioned that he shall comply with this court's orders or face further sanctions as this court deems necessary and appropriate; and

(3) that Mr. Watson shall file no further actions in this or any other federal district court or state court regarding this

matter as to the issues already fully adjudicated, as set forth above.

IT IS SO ORDERED.

Dated: June 14, 1994

MARILYN HALL PATEL
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FREDERICK E. WATSON,	)	
	)	No. C-94-0425
Plaintiff,	)	MHP
	)	
vs.	)	ORDER re:
	)	ATTORNEYS'
ANTHONY J. TREPEL, et al.,	)	FEES & COSTS
	)	
Defendants.	)	[Filed August 5,
	)	1994]

By order filed June 14, 1994, this court granted defendants' motion to dismiss, granted their request for attorneys' fees and costs, and ordered them to submit declarations and other evidence setting forth the fees and costs expended in defending this action. The court further provided that plaintiff would have fifteen days from the date of defendants' submissions to file an opposition addressing the reasonableness of those fees.

Defendants filed their evidence regarding fees and costs on July 14, 1994, making plaintiff's opposition due fifteen days thereafter, or by July 29, 1994. On August 1, 1994, plaintiff filed a document notifying the court of his bankruptcy case (and the automatic stay resulting therefrom), and arguing only that while an award of fees and costs would be proper, enforcement of such an award would be barred by the automatic stay. Nowhere does plaintiff challenge the reasonableness of defendants' submissions.

Defendant have submitted declarations to the effect that defendant Lungren has incurred attorneys' fees in the amount of $9,247.50 to date. See Declaration of Damon Connolly; Declaration of Michelle Gluck. This figure represents the work

of two attorneys, billing at $90.00/hr. for 102.75 hours. Id. Defendants also submit that they incurred no reimbursable costs in defending this action. Plaintiff has not timely challenged the reasonableness of these fees, and they appear eminently reasonable to this court. Furthermore, plaintiff is correct that this court is not barred by the automatic stay emanating from his bankruptcy proceeding from imposing sanctions in this action. See Alpern v. Lieb, 11 F.3d 689, 690 (7th Cir. 1993) (holding that the automatic stay does not preclude a court from imposing Rule 11 sanctions, as such sanctions fall within the section 362(b)(4) exemption for actions brought pursuant to governmental regulatory powers); O'Brien v. Fischel, 74 B.R. 546, 550 (D. Haw. 1987) (same.)[1]

Accordingly, IT IS HEREBY ORDERED that plaintiff SHALL pay defendants attorneys' fees in the amount of $9.247.50.

Dated: June 14, 1994

MARILYN HALL PATEL
United States District Judge

ENDNOTES

1. It is unnecessary to address the merits of plaintiff's second contention that enforcement of such an award is barred by the automatic stay, as the issue of enforcement is not now before the court and is, as plaintiff concedes, inapposite to the subject matter of this order.

APPENDIX J

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK E. WATSON, Plaintiff-Appellant, v. ANTHONY J. TREPEL; DANIEL E. LUNGREN; and ORRICK, HERRINGTON & SUTCLIFFE, Defendants-Appellees.	)	No. C-94-0425 MHP **MEMORANDUM*** [Filed June 9, 1994]

On Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Submitted April 13, 1995**

Before: CHOY, SKOPIL, and FERGUSON, Circuit Judges

Frederick E. Watson appeals pro se the district court's dismissal of his complaint for declaratory and injunctive relief and the imposition of Rule 11 sanctions. We affirm. The district court correctly dismissed Watson's action as barred by

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit Rule 34-4.

the "law of the case" established by this court in the Kruse appeal. See Pit River Home and Agricultural Coop. Ass'n v. United States, 30 F.3d 1088, 1096-97 (9th Cir. 1994). The district court also properly awarded sanctions. Watson's argument that the district court in Kruse did not have jurisdiction to impose Rule 11 sanctions is legally frivolous. See Willy v. Coastal Corp., 503 U.S. 131, 137-39 (1992); Pan-Pacific and Low Ball Cable Television Co. v. Pacific Union Co., 987 F.2d 594, 596 (9th Cir. 1993) (per curiam).

Watson's motions to disqualify Judge Patel and the circuit judges in Kruse are denied. Judges cannot be disqualified for "conduct or rulings made during the course of proceedings." Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1388 (9th Cir. 1988).

We agree with appellees that Watson's appeal of the district court's dismissal is frivolous. Accordingly, we award attorneys' fees and costs to appellees. Fed. R. App. Pro. 38; Bell v. City of Kellogg, 922 F.2d 1418, 1425 (9th Cir. 1991).

AFFIRMED.

APPENDIX K

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK E. WATSON,	)	
	)	C.A. Nos. 94-16274
Plaintiff-Appellant,	)	94-16585
	)	
v.	)	D.C. No. CV-94-
	)	00425 MHP
ANTHONY J. TREPEL; DANIEL E.	)	
LUNGREN; and ORRICK,	)	**ORDER**
HERRINGTON & SUTCLIFFE,	)	
	)	[Filed July 12,
Defendants-Appellees.	)	1994]
	)	

On Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Before: CHOY, SKOPIL, and FERGUSON, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Accordingly, the petition for rehearing is DENIED. Appellant's motion to file supplements to the petition for rehearing is also DENIED.